

NAVAL POSTGRADUATE SCHOOL

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THESIS

**ANALYSIS OF ARMED SERVICES BOARD OF
CONTRACT APPEALS, GENERAL ACCOUNTING
OFFICE, AND FEDERAL COURT DECISIONS ON BEST
VALUE IN FEDERAL PROCUREMENT**

by

Scott J. Hoffman

June 2001

Thesis Advisor:
Associate Advisor:

E. Cory Yoder
Lee Edwards

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BEST VALUE IN FEDERAL PROCUREMENT**

Scott J. Hoffman
Lieutenant Commander, United States Navy
B.A., University of Wisconsin-Whitewater, 1987

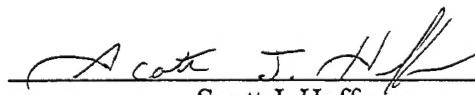
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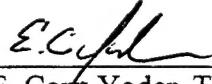
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Author:



Scott J. Hoffman

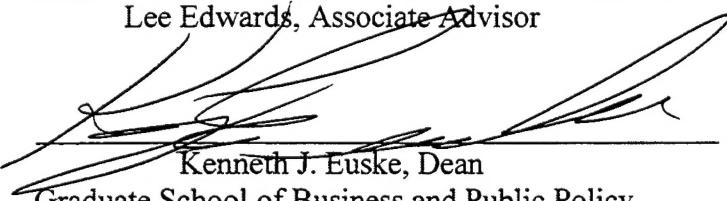
Approved by:



E. Cory Yoder, Thesis Advisor



Lee Edwards, Associate Advisor



Kenneth J. Euske, Dean
Graduate School of Business and Public Policy

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ABSTRACT

This thesis analyzed four significant rulings by the Federal Courts, Armed Services Board of Contract Appeals, and General Accounting Office with respect to disputes regarding the *best value* selections in Government procurement and recommended ways to integrate these lessons into procurement organizations.

Best value entails the use of weighted factors that reflect the relative importance of each factor to the user. This allows the introduction of past performance, experience, technical approach, and other factors to be considered in addition to price.

The thesis analyzed the issues of four specific cases to determine if there is a pattern of weakness in a specific area of *best value* implementation. The aim is to bring any weaknesses to the attention of the acquisition professional in order to promote better application of *best value* and avoid future disputes, or at a minimum eliminate sustained disputes against the Government.

This thesis also looked at the commercial sector use of *best value* selections to view the similarities and differences that can be used to compare strengths and weaknesses of the Government's approach.

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	PURPOSE.....	1
B.	BACKGROUND	2
C.	RESEARCH QUESTIONS	3
1.	Primary Research Question	3
2.	Secondary Research Questions.....	3
D.	SCOPE	3
E.	ORGANIZATION	4
F.	METHODOLOGY	5
II.	FRAMEWORK.....	7
A.	INTRODUCTION.....	7
B.	BEST VALUE DEFINITION	7
C.	THE ACQUISITION AND CONTRACT PROCESSES.....	9
D.	THE PROTEST PROCESS	15
E.	THE DISPUTES PROCESS	19
1.	Claim Assertion	19
2.	Contracting Officer's Final Decision	20
3.	United States Court of Federal Claims	22
4.	Armed Services Board of Contract Appeals	23
5.	United States Court of Appeals for the Federal Circuit.....	26
6.	United States Supreme Court	27
F.	CHAPTER SUMMARY.....	28
III.	METHODOLOGY	29
A.	INTRODUCTION.....	29
B.	POPULATION DESCRIPTION	29
C.	SAMPLE DESCRIPTION	30
D.	DATA COLLECTION PLAN	31
E.	CHAPTER SUMMARY.....	33
IV.	ANALYSIS OF SELECTED CASES	35
A.	INTRODUCTION.....	35
B.	CASE ANALYSIS.....	35
1.	Case 1 – Meridian Management Corporation versus General Services Administration	35
a.	Summary of Case 1 Facts	35
b.	Meridian Management Corporation's Protest.....	36
c.	GSA's Response	38
d.	GAO's Findings and Recommendation	39
e.	Conclusions from Meridian.....	40
2.	Case 2 - Ryder Move Management Inc. v. United States and Associates Relocation Management Company Inc., Cendant	

Mobility, Interstate Relocation Service Inc., and The Pasha Group.....	41
a. <i>Summary of Case 2 Facts</i>	41
b. <i>Ryder's Claim</i>	45
c. <i>CECOM's Response</i>	46
d. <i>Court of Federal Claims Decision</i>	49
e. <i>Conclusions from Ryder</i>	51
3. Case 3 – Stratos Mobile Networks USA v. United States Navy and COMSAT Corporation	52
a. <i>Summary of Case 3 Facts</i>	52
b. <i>Stratos Mobile Networks' Claim</i>	55
c. <i>Navy and COMSAT Response</i>	56
d. <i>Court of Federal Claims Decision</i>	56
e. <i>Court of Appeals for the Federal Circuit Decision</i>	57
f. <i>Conclusions from Stratos</i>	58
4. Case 4 - Defense Systems Company, Inc. vs. United States Army.....	59
a. <i>Summary of Case 4 Facts</i>	59
b. <i>DSC's Claim</i>	65
c. <i>IOC's response</i>	67
d. <i>ASBCA's Decision</i>	69
e. <i>Conclusions from DSC</i>	71
C. CHAPTER SUMMARY.....	73
V. BEST VALUE FROM A COMMERCIAL PERSPECTIVE	75
A. INTRODUCTION.....	75
B. BEST VALUE DEFINED FROM A COMMERCIAL PERSPECTIVE.....	75
C. BEST VALUE IMPLEMENTATION, A COMMERCIAL PERSPECTIVE.....	77
1. Use of <i>Best Value</i> in non-Government contracts.....	77
2. Use of <i>Best Value</i> in Government contracts	78
C. AREAS OF <i>BEST VALUE</i> THAT MAY NEED ATTENTION: AN INDUSTRY VIEWPOINT.....	80
F. CHAPTER SUMMARY.....	84
VI. FINAL CONCLUSIONS AND RECOMMENDATIONS	87
A. INTRODUCTION.....	87
B. ACQUISITION PLANNING ISSUES	87
C. SOLICITATION ISSUES	91
D. EVALUATION ISSUES.....	91
E. INDUSTRY PERCEPTION OF THE GOVERNMENT ISSUES	92
F. RESEARCH QUESTIONS	93
1. Primary Research Question	93
2. Secondary Research Questions	94
G. RECOMMENDATIONS.....	97
H. AREAS FOR FURTHER RESEARCH.....	97

LIST OF REFERENCES.....	99
INITIAL DISTRIBUTION LIST	101

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LIST OF FIGURES

Figure 2.1	The Acquisition and Contract Processes	10
Figure 2.2	Source Selection Process	14
Figure 2.3	Disputes Process	21

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I. INTRODUCTION

A. PURPOSE

The purpose of this thesis is to analyze significant rulings by the Federal Courts, Armed Services Board of Contract Appeals, and General Accounting Office with respect to disputes regarding the *best value* selections in Government procurement. These decisions may contain lessons learned that will eliminate future disputes or point to an area that requires a regulatory solution. The thesis is also designed to recommend ways to integrate these lessons into procurement organizations.

The researcher is particularly interested in the disputes that have arisen from the introduction of *best value* and how they have been resolved. This thesis will review and analyze the issues of specific cases from the Federal Courts, Armed Services Board of Contract Appeals, and General Accounting Office to determine if there is a pattern of weakness in a specific area of *best value* implementation. The aim is to bring any weaknesses to the attention of the acquisition professional in order to promote better application of *best value* and avoid future disputes or at a minimum eliminate sustained disputes against the Government.

This thesis will look at the commercial sector use of best value selections to view the similarities as well as any differences that can be used to compare strengths and weaknesses of the Government's approach.

This thesis will also look to determine if regulatory changes would improve the acquisition process, or more specifically, those areas of the contract process that generate most of the disputes and protests. A review of the cases will be used to identify potential

problem areas, and then a review of the regulations will identify the current requirements. This comparison between the usage and regulations may illuminate the need for a regulatory change or conclude that no change is necessary.

Finally, this research effort will offer recommendations to improve the process and provide for the use of *best value* in a more effective and efficient manner.

B. BACKGROUND

The Department of Defense (DoD) possesses the largest and one of the most complex acquisition processes in the United States Government. Because DoD is the single largest purchasing activity in the world, there are numerous claims that arise on the part of the Government and commercial entities. The Government's use of *best value* in source selection by its very nature involves judgment on the part of the Government as to what is value and in some instances these judgments have led to disputes with contractors.

The use of *best value* entails the use of factors in a weighted scheme that reflects the relative importance of each factor to the Government. This allows the introduction of past performance, experience, technical approach, and other factors to be considered in addition to price instead of relying on the lowest price technically acceptable approach that awards contracts to the lowest bidder without considering other factors.

It is the duty of each party to attempt to reach agreement on these disputes at the lowest possible level in an expeditious manner in order to minimize any cost or schedule impact, however, this is not always possible and so a formal mechanism has been created to systematically evaluate the claims. Some protests can be handled by the General

Accounting Office, where disputes must be dealt with by the Armed Services Board of Contract Appeals or Federal Court. These decisions not only decide the specific case but also set a precedent for future cases in our common law system.

C. RESEARCH QUESTIONS

1. Primary Research Question

To what extent have recent rulings and decisions by the Federal Courts, Armed Services Board of Contract Appeals, and General Accounting Office highlighted recurring problems with *best value* selections and is there a means to eliminate the problems?

2. Secondary Research Questions

There are five secondary research questions:

- a. What is the background and history of *best value* in Government Procurement?
- b. What will analysis of Federal Court, Armed Services Board of Contract Appeals, and General Accounting Office decisions reveal about the Government's implementation of *best value*?
- c. How does the commercial sector utilize *best value* in conducting business?
- d. What are the lessons learned regarding *best value*?
- e. What mechanism can be put in place for the promulgation, dissemination, and incorporation of the lessons into the conduct of the Government's procurement professionals?

D. SCOPE

The scope of this thesis will involve a brief review of the history of the Federal Court, Armed Service Board of Contract Appeals, and General Accounting Office

involvement in Federal procurement, as well as a review of existing regulations and acts defining the use of *best value*.

The primary thrust of this thesis will involve an analysis of four selected cases from the U.S. Claims Court rulings involving *best value*, Armed Services Board of Contract Appeals decisions revolving around the use of *best value*, or General Accounting Office recommendations concerning *best value* selections.

The thesis will also review the commercial sector implementation of *best value* by certain companies as a comparison.

The thesis will close with recommendations to integrate any lessons learned into local procurement organizations.

E. ORGANIZATION

Chapter I of this thesis presents the purpose of the thesis and the research questions that guide the research and analysis effort. Additionally, this chapter discusses the background, scope, and methodology of this study.

Chapter II defines *best value* and its use in the Government procurements selection process. This chapter also describes the claims process and how it relates to the General Accounting Office, Armed Services Board of Contract Appeals, and Federal Courts.

Chapter III provides a brief description of the population of cases from which the selected cases were drawn and the method for gathering information from the commercial sector.

Chapter IV details the facts of the selected cases and the analysis of each case with respect to the points of contract law involved. In addition, the researcher will highlight weaknesses in the Government and contractor positions relative to contracting practices.

Chapter V will detail the implementation of *best value* in the commercial sector, as well as, some of the problems the commercial sector has had in the use of *best value*.

Chapter VI presents the conclusions and recommendations generated through this study, along with areas for future research on the subject of *best value*.

F. METHODOLOGY

The study and analysis were conducted using the following methods:

1. Review of the books, magazine articles, CD-ROM systems, Government reports, Internet based materials defining the use of *best value* in Government procurement.
2. Review and analysis of recent key Federal Court, Armed Services Board of Contract Appeals, and General Accounting Office decisions where *best value* was an issue.
3. Review how these decisions are currently disseminated to procurement professionals.
4. Review commercial sector *best value* implementation from National Contract Management Association contacts (2) through interviews.

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II. FRAMEWORK

A. INTRODUCTION

This chapter provides the background and definition of *best value* and its place in the Government's procurement system. The acquisition and contract processes will also be detailed in order to set a framework for the areas that may be eligible for protest or dispute, and to demonstrate how *best value* trade-offs impact the system that is finally fielded. This chapter will also provide the reader with an overview of the organizations involved in the protest and claims arenas, and the current procedures for a GAO protest or a dispute involving the Armed Services Board of Contract Appeals or the Federal Court system.

B. BEST VALUE DEFINITION

Best Value is the subjective term used to describe the Government's preferred source selection outcome in contractual arrangements—the implication being the lowest bidder does not always provide the item that best fits the Government's requirement in terms of total ownership costs and performance.

Best value is a critical element to the Government's acquisition reform movement to reduce costs and promote efficient purchasing while maintaining a robust war fighting capability and a responsive industrial base. *Best value* has no explicit statutory or regulatory meaning, however, it represents the trade-offs in requirements that are the primary goals of Government acquisition. This goal has no absolute definition in terms of source selection objectives but changes due to the unique nature of each procurement action. *Best value* encompasses the ideas and methods espoused by life-cycle costing,

cost as an independent variable, cost-benefit analysis, performance vs. design specifications, evolutionary purchasing, commercial best practices, performance incentive contracting, price based acquisition, and past performance as an evaluation factor.

Executive Order 12931 directed executive agencies to “...place more emphasis on past performance and promote best value rather than simply low cost in selecting sources for supplies and services”[Ref. 1]. In light of this, the Government has sought to define exactly what best value means and how to obtain it in source selection.

Federal Acquisition and Contract Management provides the definition in terms of the Government’s purchasing expectations, “...the expected outcome on an acquisition that in the government’s estimation, provides the greatest overall benefit in response to the requirement”[Ref. 2].

The Federal Acquisition Regulation (FAR) does not define *best value*, but rather discusses the *best value* continuum in light of the source selection process in negotiated contracting. The Government can obtain *best value* in a negotiated acquisition by using one or a combination of several source selection approaches from the use of a “trade-off process” to the “lowest price technically acceptable”[Ref. 3]. The FAR defines the source selection objective, “...to select the proposal that represents the best value”[Ref. 3].

The Department of Navy, Acquisition Reform Office web-site provides the best definition, describing best value as a process used in competitive, negotiated contracting to select “...the most advantageous offer by evaluating and comparing factors in addition to cost or price...”[Ref. 4] by allowing tradeoffs between cost and non-cost evaluation

factors to give the contracting officer flexibility resulting in a contract award that provides the Government "...the greatest or best value for its money...the preferred source selection methodology"[Ref. 4].

The Army's guide to best value source selection defines best value in terms of the ultimate customer,

...the outcome of any acquisition that ensures we meet the customers needs in the most effective, economical, and timely manner...the goal of sealed bidding, simplified acquisition, commercial item acquisition, negotiated acquisition, and any other specialized acquisition methods or combination of methods you choose to use.[Ref.5]

There is not a singular definition of *best value*, rather it is a concept that is defined in terms of objectives, factors, methodologies, and processes used to obtain a goal of *best value* for Government contracting.

For the purposes of this thesis effort, *best value* is defined as the formal process by which the Government develops a requirement that involves a trade-off between two or more evaluation factors, solicits bids, and makes the judgment as to which effort most closely fulfills the Government's needs.

C. THE ACQUISITION AND CONTRACT PROCESSES

The selection of a bid or offer based on *best value* is a key component of the contract process, which itself is an integral part of the Government's acquisition process. The contract process is the formal portion of acquisition process that defines the Government-contractor relationship, creating the actual documentation and applying the laws that can become the basis of a protest or claim. The acquisition and contract processes are portrayed in Figure 2.1.

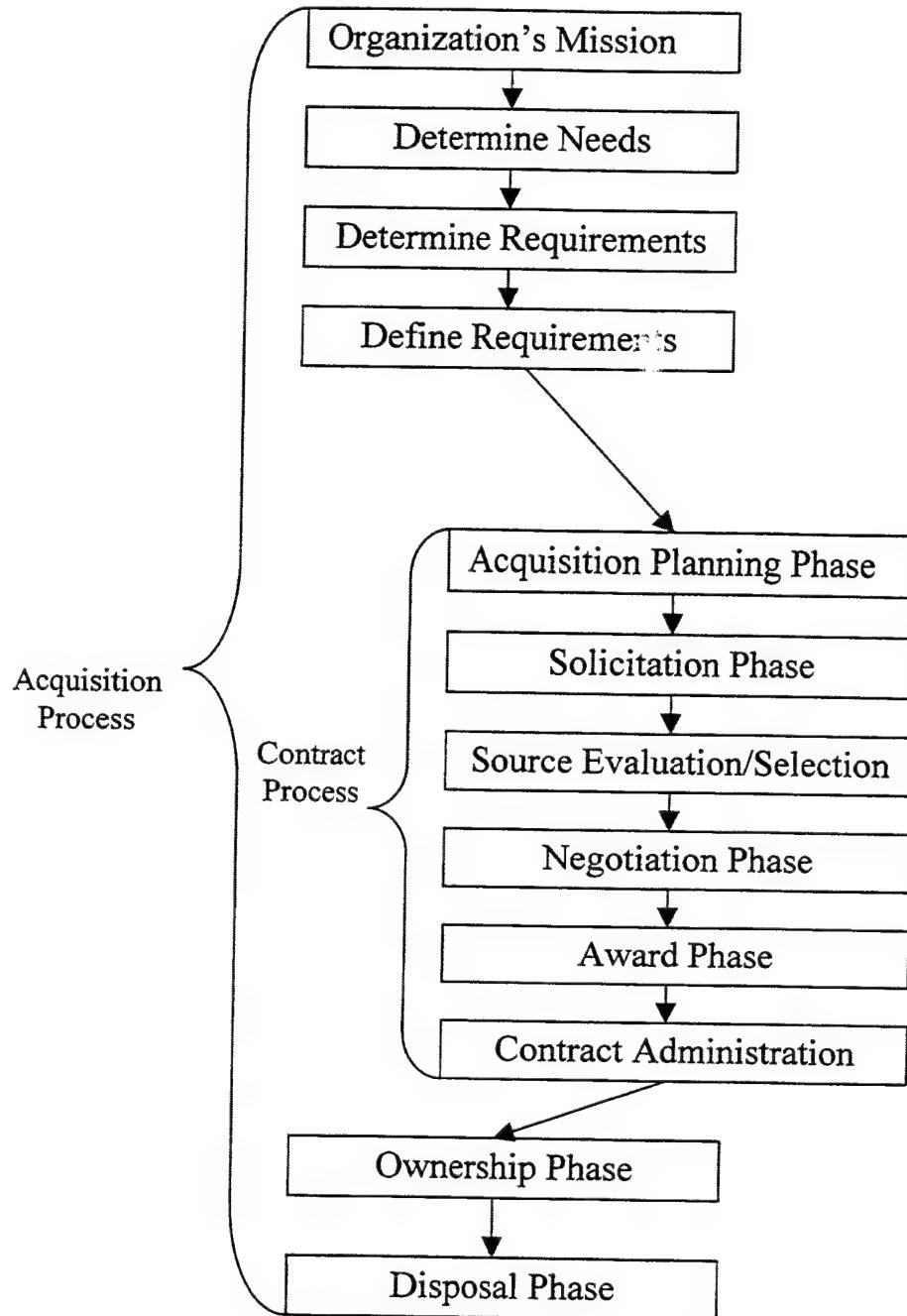


Figure 2.1 The Acquisition and Contract Processes [Ref. 6]

The first step in the acquisition process is for the organization to review its mission in the context of its role in the Government. In the case of the Department of

Defense, the mission is to defend the United States and her allies. This is a very nebulous mission and would be difficult to translate into an effective process so the mission must be somewhat more specific. The second step is to define the needs of the organization in carrying out its mission, this is followed by determining the requirement. The fourth step is where some of the ambiguousness of the earlier steps starts to take on form. The requirements identification phase results in a statement of work, statement of objective, or design specification and results in a procurement request.

The next six steps are a subgroup of the acquisition process referred to as the contract process and includes: the acquisition planning phase; the solicitation phase; source evaluation and possible selection; negotiation phase; contract award phase; and contract administration phase. The contract process is where the protests and disputes arise because this is the arena where the Government interacts with the industrial base using laws that attempt to ensure the Government gets best value while simultaneously achieving certain socio-economic goals and adhering to a rigid legal and regulatory framework. The contract process also defines the relationship and results in the documentation that is needed to prove the intent of the parties.

The first step of the contract process, fifth step of the acquisition process, is the acquisition planning phase. During this phase, the Government conducts market research to determine what is available in industry as far as products that may meet the requirement or the industrial capability to develop a system that meets the requirement. This phase also involves determining the level of competition in the market, as well as potentially conducting a pre-solicitation conference to inform industry of the broad parameters of the acquisition if the program deems it beneficial to the Government or

industry. Another method used to develop industry input during this phase is the posting of a program synopsis in the Commerce Business Daily (CBD). The Government must also develop the acquisition plan deliverables, such as: determining the contract method (sealed bid or competitive proposal); determine the contract type that best fits this acquisition; develop a Statement of Work or Statement of Objective; cost goals; technical, cost and schedule risks; develop a Source Selection Plan to maximize competition, minimize the complexity of the solicitation and evaluation/selection decision, ensure impartiality, and ensure the selection of the source whose proposal has the highest degree of realism and will provide the Government with *best value*; develop the evaluation criteria for the *best value* factors of performance, technical approach, past performance, quality, and cost/price; and draft the Request for Proposal (RFP).

The solicitation phase is the second phase of the contract process and involves the solicitation documents and the posting of the RFP or an Invitation for Bid (IFB). The IFB is used if the acquisition is be evaluated as Lowest Price Technically Acceptable (LPTA). An LPTA is still considered to be along the best value continuum, it just indicates that as long as the product or service meets certain minimum standards price will be the only factor used to determine the awardee. This phase can also involve holding a bidders conference if desired and modifying or amending the solicitation if necessary.

The source evaluation phase is the third step of the contract process, seventh step of the acquisition process. The formal source selection process outlined here may be abbreviated depending on the complexity of the product or service involved in the acquisition, however, each of the elements of this process needs to be considered in every

acquisition. A general source selection team is hierarchical in nature, with the Source Selection Authority (SSA) at the top, supported by a Source Selection Advisory Council (SSAC) and a Source Selection Evaluation Board (SSEB) as portrayed in Figure 2.2.

The evaluation process starts with the receipt of the proposal by the SSEB. The SSEB “is a group of military and/or civilian personnel, representing the various functional and technical areas involved in the acquisition”[Ref. 2]. The SSEB, which is appointed by the SSAC, evaluates the proposals against the RFP to determine those that meet the requirement. The SSEB will evaluate and score each of the proposal the against the requirements spelled out in the source selection plan, the goal is to ensure only proposals that meet the criteria standard are forwarded to the SSAC.

The SSAC “...is a group of senior Government personnel appointed to serve as the staff and advisors to the SSA during the source selection process”[Ref. 2]. The SSAC analyzes the results of the SSEB and draw conclusion relative to price/cost, technical effectiveness, risk, the offeror’s past performance and current capabilities, results of the negotiations, and other factors requested by the SSA or that may have an impact on the selection. The SSAC also evaluates the proposals against each other to establish the competitive range, which includes those contractors that have the best chance of being awarded the contract based on the evaluation factors spelled out in the Source Selection Plan.

The SSA “...is the official appointed to direct the source selection process”[Ref. 2]. The SSA approves the Source Selection Plan, appoints the chairman and members to the SSAC, and most importantly, selects the contract awardee.

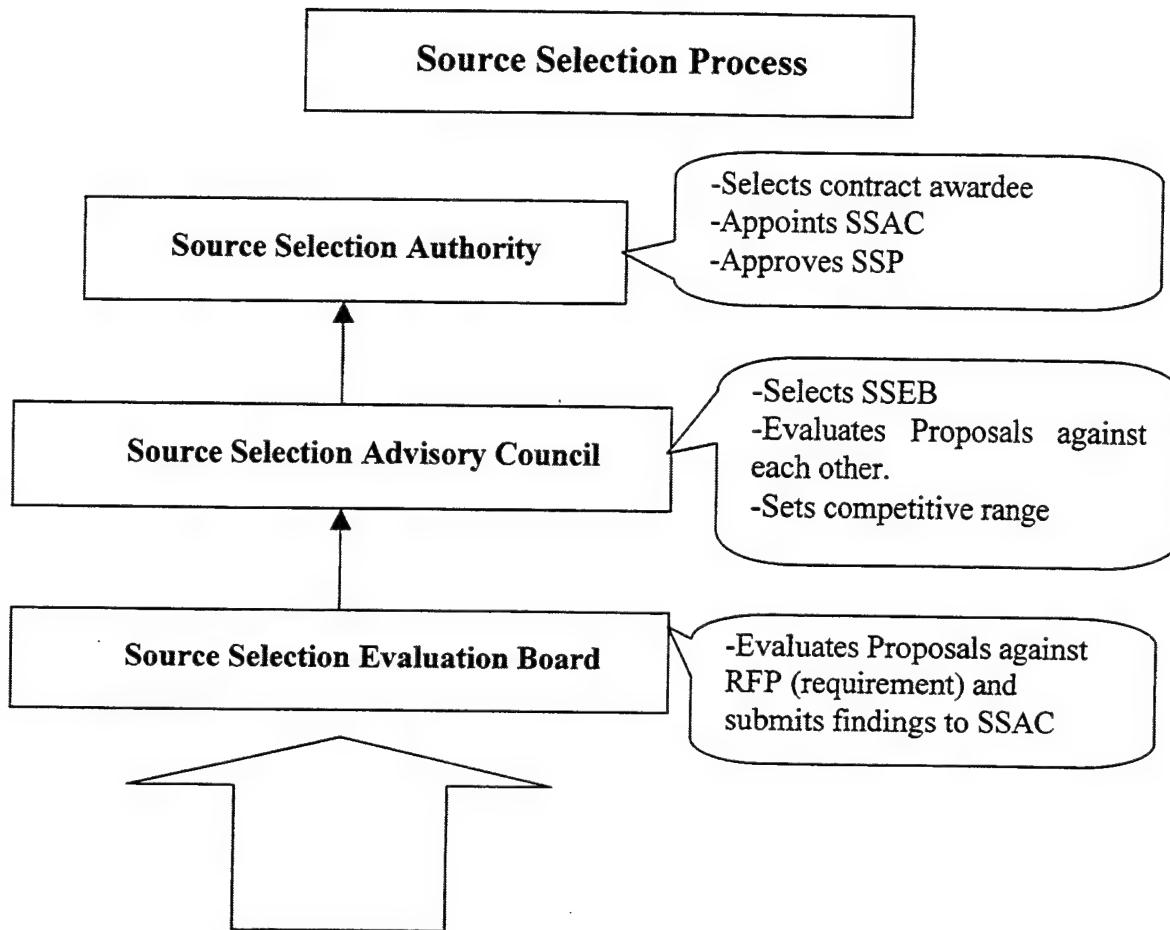


Figure 2.2 Source Selection Process [Ref. 6]

The fourth step of the contract process, eighth step of the acquisition process is the negotiation phase. The Government negotiates with those offerors in the competitive range in order to move the contractor(s) closer to the Government's *best value* objective. The agreement is approved and the unsuccessful offerors are debriefed in order to provide them feedback on ways that they may improve their proposals and position for future acquisitions.

The next step is the contract award phase, where the contract is actually signed and the award is announced in the CBD. Congress is also notified of large buys because of the fiscal impact and the potential for interest from their constituents.

The final step in the contract process is the contract administration phase. This phase involves the monitoring and surveillance of the contractor performance as well as reviewing the cost allowability for a cost reimbursement type contract.

The eleventh phase of the acquisition process is the ownership phase. The ownership phase is the phase that all prior steps are designed to achieve. This is where the system is fielded and the end user operates the equipment. Good *best value* trade-off decisions show during this phase through increased performance, lower cost, or the delivery schedule being met by the contractor. The ownership phase typically accounts for 60 to 80 percent of the Total Ownership Costs (TOC) of a major system, so any decision in the earlier steps that requires or saves the expenditure of resources is magnified in this phase.[Ref. 7]

The final step in the acquisition process is the disposal of the system at the end of its useful life. This may involve reuse, demilitarization considerations, hazardous materials, or the transfer of an asset to an allied Government.

D. THE PROTEST PROCESS

A protest is a complaint by a party that the agency involved in a specific solicitation has failed to carry out statutory or regulatory requirements properly. Historically, protests were filed with the Contracting Officer or the General Accounting Office (GAO). The Competition in Contracting Act of 1984 gave GAO oversight of

protests a statutory foundation but left dissatisfied contractors with the option to submit bid protests to the U.S. Court of Federal Claims.

Protests have a significant impact on Government procurement. A Contracting Officer may need to spend considerable time and effort researching protest decisions to ensure that their procurement actions reflect the correct procedures and statutes in order to avoid the likelihood of a protest. They may also be called upon to support their, and the agency's, actions when a protest does arise.

From the perspective of an agency's mission and program progress, protests are dramatically important because they may introduce substantial delay and when an agency is found to have faulty procurement processes, embarrassment. Budgetary and legislative consequences could be generated if significant errors or deficiencies are disclosed as a result of the protest procedures.[Ref. 8]

The protest process allows contractors to have an independent party review certain Government actions that the contractor feels unfairly affected his ability to compete. The protest must be in writing and are heard by the General Accounting Office (GAO), who reviews the facts of the protest and make a recommendation to the Agency or Department.

Protests may be filed to take exception to Governmental action relative to the release of a solicitation by an agency or department for bids or offers, the proposed award of a contract, or the actual award of contract. The protest is valid only if GAO determines that the originating contractor has "standing". Factors for determining if a protestor has "standing" are:

An offeror who submits a late is not an interested party for protest purposes. Generally, to be an interested party, a protestor must be in line for award if the protest is sustained. However, even a protester not in line

may be an interested party if he seeks cancellation of the solicitation and resolicitation of the requirement. In that case, if successful, the protestor would be able to compete again. A party who submits a late proposal does not have standing to protest the evaluation of proposals or any changes in terms of the solicitation that result from proposal evaluation. Such issues affect only the parties that remain in the competition.[Ref. 2]

A bidder/offering who is non-responsive for other than non-correctable technical deficiencies, may be considered an interested party. If the protest were sustained, the protestor would likely be eligible to participate in reopened negotiations or the resolicitation of the requirement. This is a different situation than the protestor who submits a late bid or proposal.[Ref. 2]

One exception does exist from the “interested party” rule. When a bidder or offeror wants to protest the terms of a solicitation before the bids or proposals are due, a protest cannot be filed without affecting its right to remain in the competition. The protest is considered to be valid.[Ref. 2]

To be valid, the protest must be filed directly with the GAO within 10 days of the event that is the contractor’s basis for the protest and the protester has one day to furnish a copy of the protest to the Contracting Officer. The Contracting Officer must suspend performance or terminate the awarded contract if he receives notice of a protest filed with the GAO within 10 days after award of the contract.

GAO will review the protest based on the facts of the case and can make recommendations to the Contracting Officer regarding issues involving the solicitation, evaluation, competitive range determination, discussions, negotiations, or award. GAO is not a true court, so if the Government disagrees with GAO’s recommendations, it can choose to ignore the recommendation. However, GAO is an independent review of the Government’s actions so Contracting Officers are required to consider all protests, filed before or after the award and should involve the command’s legal team prior to making any decision on the handling of a protest.

If a contractor is not satisfied with the GAO recommendation or the Contracting Officer's handling of it, the protestor may file a suit in the U.S. Federal Court of Claims. When bringing suit, the protestor must also seek an injunction to enjoin the Government from awarding the contract or, if the contract is already awarded, permitting further performance until the matter is resolved.

The GAO serves as an independent, nonpartisan agency that works for Congress and investigates how the Government spends funds in order to determine how well the executive branch is meeting the intent and objective of the funds appropriated by Congress and signed into law by the President.

GAO was created by the Budget and Accounting Act of 1921 by transferring auditing, accounting, and claims functions from the Treasury Department to the newly created agency, moving these functions from the executive to legislative branch.

GAO provides numerous services to Congress, including: 1) evaluating how well Government policies and programs are working; 2) auditing agency operations to determine whether federal funds are being spent efficiently, effectively, and appropriately; 3) investigating allegations of illegal and improper activities, and; 4) issuing legal decision and opinions.

It is this fourth area of GAO activities, issuing legal decisions and opinions that brings GAO squarely into the realm of the Government's procurement system. GAO has the responsibility of hearing protests and then making recommendations based on the law and facts of the case.

E. THE DISPUTES PROCESS

A contract dispute differs from a protest due to the fact that disputes result from an existing contract and involve rights and obligations "...are actionable under terms of the contract for which legal remedies exist" [Ref. 8]. The Contract Disputes Act of 1978 (CDA) codified the method by which disputes between a contractor and the Government are resolved. The CDA has given the contractor the right to appeal the COFD to a Board of Contract Appeals or the Court of Federal Claims. In most cases, mediation and negotiation efforts should be exhausted prior to entering into the disputes process. The disputes process starts with a Contracting Officer's Final Decision (COFD) and may, in certain circumstances, be appealed to the United States Supreme Court. Figure 2.3 conveys the hierarchical nature of the disputes process.

1. Claim Assertion

The dispute process commences with the contractor's written claim against the Government. The CDA contains no standardized format for a claim. However, the CDA does say that a valid claim must be in writing and submitted to the Contracting Officer, certified if over \$100,000. The CDA further stipulates that:

For claims of more than \$100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor. [Ref. 9]

Once the Contracting Officer receives the claim, he is required to make a timely decision on the claim. The receipt of the claim also starts the clock for calculating the interest due on the claimed amount. It is in the best interests of both parties to try to resolve the dispute at the lowest possible level due to the added costs in terms of time and

money that each step in the dispute phase entails. Additionally, a positive relationship between the Government and contractor has a better chance of being maintained if the parties reach an agreement instead of going through the formal disputes process, which is adversarial in nature.

2. Contracting Officer's Final Decision

This initial step of the disputes process requires that the Contracting Officer render a final decision rejecting the contractor's claim on behalf of the Government.

The Contracting Officer and contractor first attempt to resolve the claim through negotiation acting on behalf of their respective stakeholders. If they are successful, they have in essence modified the contract and come to a new bilateral agreement. If the Contracting Officer and the contractor cannot successfully negotiate the claim to the satisfaction of both parties, the CDA requires that the Contracting Officer render a final decision rejecting the claim on behalf of the Government, this decision is called the Contracting Officer's Final Decision (COFD). The COFD becomes the first step in the disputes process.

The Contracting Officer's Final Decision includes:

1. A description of the claim or dispute.
2. A reference to the pertinent contract provisions.
3. A statement of the factual areas of agreement or disagreement.
4. The Contracting Officer's supporting rationale.
5. A demand for payment when the decision finds that the contractor is indebted to the Government.

When rendering a COFD, the Contracting Officer must analyze the claim based on procurement regulations and the objective merits of the claim and not allow any bias from his position as the Contracting Officer to influence the decision. The Contracting

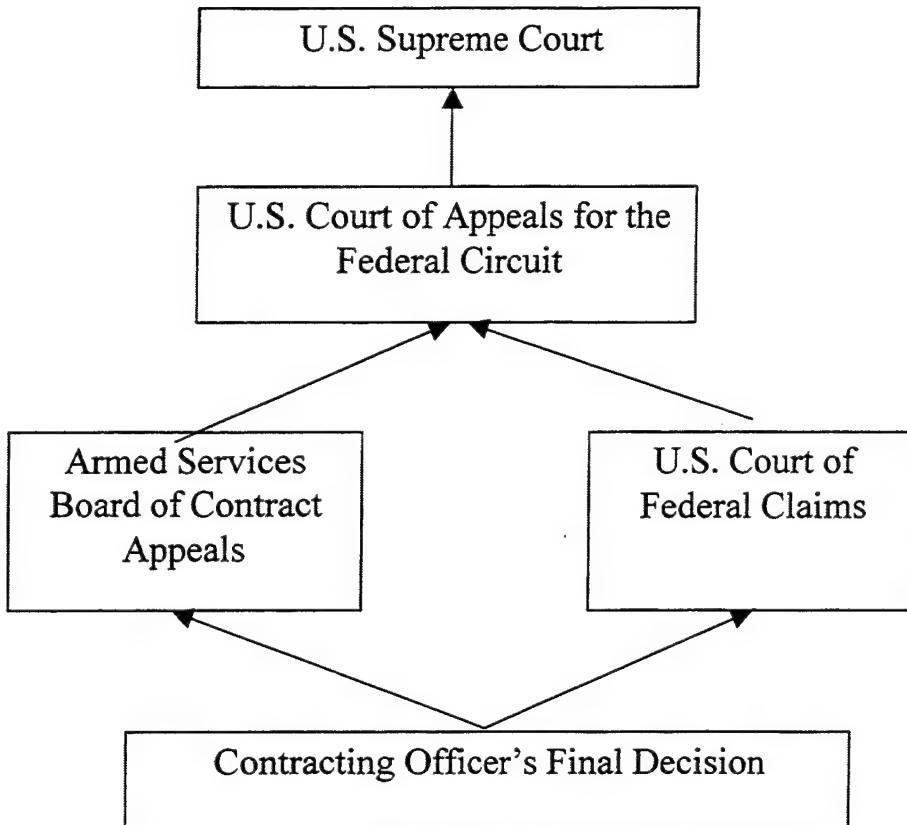


Figure 2.3 Disputes Process [Ref. 6]

Officer is presumed to have acted in good faith and a contractor must present, “well-nigh irrefragable proof to overcome the presumption of good faith dealing”[Ref. 10]. Since the Contracting Officer renders the COFD and is assumed to be acting in good faith to all parties, the contractor is the only party that may challenge the COFD. The Government, by issuing the Contracting Officer a warrant to contract on behalf of the Government, certifies that the COFD is a valid outcome.

The COFD must include a paragraph that details the contractor’s rights, relative to possible appeals. The paragraph spells out the alternatives available, as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claims procedure for claims of [\$50,000] or less or it's accelerated procedure for claims of [\$100,000] or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims within 12 months of the date you receive this decision.[Ref. 9]

This paragraph presents the contractor with a choice of where he would like to officially challenge the COFD based on Government's position. The CDA details that the contractor may present his case to the Agency's Board of Contract Appeals or bring suit directly against the Government in the U.S. Court of Federal Claims.

If the Contracting Officer fails to issue a COFD in a timely manner, the courts and agency board of contracts appeals have acted as if the COFD had been issued denying the contractor's claim.

3. United States Court of Federal Claims

The CDA gives the contractor the option of appealing an adverse COFD directly to the United States Court of Federal Claims, formerly the Court of Claims. The original Court of Claims was created by Congress to "...safeguard the financial stability of the Government by not permitting a multitude of claims to deplete the treasury"[Ref 11].

Originally, the Court of Claims could only hear claims and determine if they had merit, Congress was still required to review the claims found to have merit and then act on them. It was not until 1861 that President Lincoln recommended, and Congress

accepted in 1863, that the judgments of the Court of Claims be considered final, requiring no further action by Congress that the courts jurisdiction over claims was created.

The Court of Federal Claims is the trial court for Federal contract suits and the Federal Courts Administration Acts clarified its jurisdiction and procedures in 1982 and 1992.

The court hears lawsuits against the United States based on the Constitution, federal laws, or contracts, or for damages in actions other than torts. It also has jurisdiction to determine cases concerning the salaries of public officers or agents, damages for someone who was unjustly convicted of a federal crime and imprisoned, and some American Indian claims.[Ref. 11]

4. Armed Services Board of Contract Appeals

The Armed Service Board of Contract Appeals (ASBCA) is the oldest and largest of the Government's 11 Board of Contract Appeals. The mission of the ASBCA is to provide fair and relatively fast resolution of contract disputes, thus avoiding the great expense and time consumption of the Federal court system.

The ASBCA was created through the consolidation of the former War Department Board of Contract Appeals and the Navy Compensation Board in 1949 and was chartered to act as,

...the authorized representative of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, in hearing, considering and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions.[Ref. 12]

The genesis of Contract Appeals Board can be traced to a 1868 U.S. Supreme Court decision that upheld an Executive Department's authority to appoint boards in order to administratively resolve contract disputes.

The original charter of the ASBCA was modified in 1962, 1969, 1973, and 1979 and currently includes the following key provisions:

The members are required to be attorneys at law that have been qualified under the CDA and a designated as Administrative Judges by the Agency.[Ref 13]

Decisions shall be by majority vote of the specific division hearing the case unless the Chairman refers the appeal to the Senior Deciding Group.[Ref. 13]

The Board has the power to “hold hearings, examine witnesses, and receive evidence and argument for consideration and determination of the appeal...A member of the Board shall have authority to administer oaths and issue subpoenas as specified in Section 11 of the Contract Disputes Act of 1978”[Ref.13].

The rules governing the ASBCA were revised in 1997 in order to process the disputes in a timely manner. Some of the more significant rules used by ASBCA are:

The optional accelerated procedure is available if the dispute is valued at \$100,000 or less. There is a 180-day limit on processing time under the accelerated procedure and decisions are rendered by a single judge with concurrence of the parties. Election of the accelerated or small claims expedited procedures must be made within 60days of notice of docketing and the election may not be withdrawn without permission of the Board.[Ref. 13]

The appellant may elect to have the case heard under the expedited small claims procedures if the dispute is valued at \$50,000 or less. There is a 120-day limit on processing time under the small claims procedure and it may be assigned to one judge. Perhaps the most significant feature of this procedure is that a, “...decision against the Government or the contractor shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside.[Ref. 13]

The Notice of Appeals must be furnished to the Board within 90-days of the receipt of the Contracting Officer’s decision. The Board also has various timelines for claims based on value and complexity.[Ref. 13]

The Board has established procedures to comply with the Equal Access to Justice Act (EAJA) in order to “...assist parties in adjudication of EAJA

applications for award of fees and other expenses incurred in connection with appeals of decisions...This provision is designed to assist small businesses that feel an appeal has merit but are concerned with the cost of appealing a Contracting Officer's decision.[Ref. 13]

The ASBCA, along with the other Boards of Contract Appeals has extensive experience regarding Alternative Disputes Resolution (ADR) and devotes considerable time and effort in these "extra judicial" settlement methods. The ASBCA will use ADR if they are requested by both parties and can be non-binding or the parties may agree to make them binding if so desired. If the parties select a non-binding ADR and find its outcome unsatisfactory to one or both parties, the appeal will be restored and be routed through the ASBCA's standard procedures.

The advantage of ADR over the other methods of dispute is reduced cost and time. Just as the use of a Board of Contract Appeals is less expensive and more timely than a suit in the Federal Court of Claims, so to is ADR less expensive and more timely than presenting a case for the ASBCA. The parties may also select from various methods including: Settlement Judge, Mini-trial, Summary Trial with Binding Decision, and Other Agreed Methods.

The Settlement Judge method involves an Administrative Judge or Hearing Examiner who is appointed for the purpose of facilitating a settlement. This method involves a frank, in-depth discussion of each side's strengths and weaknesses in an attempt to elicit a compromise. The Settlement Judges recommendations are not binding, however, the parties can make the result binding by signing a supplemental agreement.

The Mini-Trial is a,

...highly flexible, -expedited, but structured procedure where each party

presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and to a Board appointed neutral advisor.[Ref. 13]

The parties determine the format of the presentation and then upon conclusion of the presentations commence settlement negotiations. The ASBCA advisor's recommendations are not binding but the parties once again, have the option of making their agreement binding.

The Summary Trial with a Binding Decision is an appeal that is expedited and the parties try their appeal before an Administrative Judge or panel. To use this method, both parties must agree that the summary written decision is final, conclusive, not appealable and may not be set aside, except in the case of fraud.

The ASBCA is also open to other methods of ADR that the parties may present, provided the parties and the Board agrees that the proposed method is acceptable and has a chance to succeed.

The ASBCA's overall philosophy can be gleaned from the final paragraph of the ASBCA rules:

Generally, if the parties resolve their dispute by agreement, they benefit in terms of cost and time savings and maintenance or restoration of amicable relations... Any method adopted for dispute resolution depends upon both parties having a firm, good faith commitment to resolve their differences. Absent such intention, the best structured dispute resolution procedure is unlikely to be successful.[Ref. 13]

5. United States Court of Appeals for the Federal Circuit

The Court of Appeals for the Federal Circuit is considered a constitutional court and is established pursuant to Article III of the Constitution, which states, "The judicial Power of the United States, shall be vested in one supreme court, and

in such inferior courts as the Congress may from time to time ordain and establish.”[Ref.11]

The Court of Appeals for the Federal Circuit is unique from other Federal Circuit Courts because its jurisdiction is not limited by regional boundaries but by the topics that it exercises its jurisdiction over: public contracts, patents, and copyrights. This specialized jurisdiction was created because Congress decided it was crucial to interstate commerce and the public well being that these issues be decided by the uniform application of legal principles nationwide vice on a district-by-district basis.

The Court of Appeals for the Federal Circuit decides which cases merit its attention.

As a result of its topical appellate jurisdiction, the Court of Appeals for the Federal for the Federal Circuit significantly reduces the number of appeals from such decisions to the Supreme Court.[Ref.11]

This court is the appeals court for the Court of Claims and the ASBCA. As the appellate court, the Court of Appeals for the Federal Circuit reviews the application and interpretation of the law by the Court of Federal Claims and the Agency Board of Contract Appeals, (i.e., ASBCA) but does not retry the facts of the case.

6. United States Supreme Court

The Supreme Court is the highest court in the United States and as such, “...reviews Government contract cases decided by the Federal Circuit only when they, at least potentially, would have far-reaching precedential effect and have the approval of the Attorney General”[Ref. 11]. As mentioned previously, Supreme Court is the constitutional court from whose Article III power all inferior courts are created. The

Supreme Court is empowered to hear appellate cases that originate anywhere in the United States or her territories.

To date, no case involving a *best value* trade-off dispute has been heard by the Supreme Court.

F. CHAPTER SUMMARY

This chapter defined best value in the context of Government procurement. This chapter also detailed the acquisition and contract processes and how the Government's decision to conduct an acquisition along the *best value* continuum impacts each of the steps. Additionally, this chapter described a protest and how GAO can impact the final outcome of any acquisition. Finally, this chapter described the disputes process and the part that ASBCA and courts play in resolution of Government contract disputes. Chapter III will describe the population from which the cases that will be analyzed in Chapter IV are drawn. Chapter III will also describe the data collection method for the cases and the method used to collect information on the use of *best value* in the commercial sector.

III. METHODOLOGY

A. INTRODUCTION

This chapter discusses the methods used to collect the data for the case analysis provided in Chapter IV, as well as the methods used to gather information on the commercial use of *best value* for Chapter V.

The population description provides a general framework of the population from which to draw the cases for analysis in Chapter IV, followed by the general description of the commercial sector companies that are most likely to have *best value* dealings with other commercial concerns and the Government.

The sample description provides the details as to how the specific cases were chosen for Chapter IV and the issues they represent relative to *best value*. The sample area also gives a general description of the types of companies to be interviewed for their use of *best value* in the commercial sector and how their experience in non-government *best value* compares to their efforts in Government *best value* solicitations.

B. POPULATION DESCRIPTION

The population for this study consisted of 136 *best value* selection protests brought before the GAO; 42 *best value* contract disputes brought before the ASBCA; 23 *best value* contract disputes brought before the U.S. Court of Federal Claims; and 5 *best value* contract appeals brought before the Court of Appeals for the Federal Circuit from January 2000 to April 2001. The cases for the thesis were reviewed using the actual court transcripts from LEXUS/NEXUS for the 70 disputes heard by the courts and the

ASBCA, and the GAO recommendation for the 136 protests involving *best value*. The population includes only those cases where the adjudicating authority reached a decision or recommendation and does not include any cases that were settled out of court or where ADR was utilized to come to a negotiated agreement.

The population did not include any cases from the U.S. Supreme Court because the high court has yet to hear a procurement case involving the Government's use of *best value*. The Supreme Court has heard 220 cases involving procurement, but none had *best value* as the issue in dispute.

The population for the interviews conducted in Chapter V was considered to be any commercial firm that had experienced a *best value* selection involving the Government, and who used a similar concept in dealing with their commercial sector procurements.

C. SAMPLE DESCRIPTION

In order to concentrate the focus of the study and review specific cases with the level of detail necessary to draw meaningful conclusions on the Government's implementation of *best value*, a sample from the population was necessary. The sample was drawn from the population in a manner that would allow for the analysis to cover *best value* implementation in the acquisition process, specifically: the development of evaluation factors, the promulgation of these factors, and the awarding of the contract based on making the correct trade-off decisions while complying with all of the laws and regulations inherent in Government procurement.

Another consideration for selecting a case to be included in the sample was that the decision by the adjudicating authority was not overturned by a higher authority because for a decision to be overturned at the appellate level means that the trial court misinterpreted the application of law. The exception to this was the review of cases to be examined from U.S. Court of Appeals for the Federal Circuit. As such, a case was chosen specifically because the appellate court had overturned the trial court. This allows the reader to view both sides of the legal argument through the eyes of the different courts and to view the same set of facts from a different perspective.

The four cases selected include a review of a GAO protest for improper evaluation and solicitation; a U.S. Court of Federal Claims suit involving arbitrary and capricious evaluation and unfair treatment; an ASBCA case involving a *best value* solicitation and performance that led to bankruptcy of the contractor; and, a U.S. Court of Appeals for the Federal Circuit case overturning a Court of Federal Claims ruling regarding a *best value* selection.

Sample size for the interviews was two companies, one from the technology and service sectors of the economy and one from the service sector, who have had experience with Government *best value*, and who use a similar concept in their non-government dealings.

D. DATA COLLECTION PLAN

The first aspect of the data collection plan involved a review of literature, including: books, magazines, journals, Government reports, previous theses, and Internet based materials to determine if there was a resource that regularly dealt with the

Government's implementation of best value and some of the lessons that may have been learned by following the decisions of recommendations of the various adjudicating authorities that exercise jurisdiction over the Government contract process.

The literature review was also designed to determine how these decisions are currently disseminated to procurement professionals and if there were one resource that the procurement community could use to conduct periodic training or consult prior to conducting an acquisition in order to avoid repeating previous mistakes made by other agencies.

The second aspect of the data collection involved the use of the library's LEXUS/NEXUS search engine to review the Federal Courts and Armed Services Board of Contract Appeals decisions where *best value* was an issue. LEXUS/NEXUS was also used to review the recommendations of the GAO regarding protests, pre- or post-award, where the central issue revolved around the Government's implementation or evaluation using *best value*.

Selected decisions from the adjudicating authorities were analyzed to highlight the significant problems found to exist in the use of *best value* as the selection criteria in Government procurement.

Interviews were conducted with two commercial firms to determine how they might be implementing *best value*, and if so, had they encountered any problems with its use in the commercial sector or from dealing with the Government on a *best value* procurement.

The questions used in the interviews were:

1. Does/has your company used *best value* or similar concept for source selection in your commercial purchases?
2. Does your company have a working definition of *best value* and what is it?
3. Does your company use one particular evaluation factor repeatedly or does it vary often?
4. What has been your experience, positive and negative, relative to your commercial procurements?
5. What has been your supplier feedback?
6. Has your company dealt with any Government procurement actions that involved *best value* and, if so, what has been your experience?
7. What has the Government done well?
8. What has the Government done poorly?
9. What areas could your company have improved upon in your dealings with the Government in *best value* selections?
10. Are there any areas; policy announcements, criteria, etc., that you feel would improve the Government's use of *best value* from the perspective of both sides?
11. Has your industry association expressed feedback, positive or negative, on the Government's or commercial use of *best value*?
12. Has your company been involved in a dispute or protest? If so, what were the specifics and how was it resolved?

The interviews were conducted via phone in May of 2000.

E. CHAPTER SUMMARY

This chapter outlined the methodology used to discover and present the cases detailed in Chapter IV. This chapter also described the manner in which the data for Chapter V were collected from commercial sources.

The description of the population cases and how this was reviewed in order to arrive at the sample cases detailed the issues that were used as discriminators in selecting cases that could provide lessons and insight into problems in the Government's usage of *best value*.

This chapter also described the manner in which data were collected from the commercial sector, as well as providing a list of the questions presented to the companies.

IV. ANALYSIS OF SELECTED CASES

A. INTRODUCTION

A detailed analysis was conducted on the four selected cases to explore the *best value* issue that each of the cases highlighted. These four cases represent the protest and dispute process and the adjudicating authorities that have heard *best value* cases.

Each of the cases is presented using a five-step framework. The initial step is the summary presentation of the finding of fact; the second and third steps are a synopsis of the parties' arguments. Fourth, the applicable policy and interpretation of the adjudicating authority is detailed. The final step details the conclusions and lessons that can be drawn from each of the cases, noting the difference in *best value* policy interpretation and execution for the cases found in favor of the contractor; and noting the correct usage of *best value* in the case of the COFD being upheld.

B. CASE ANALYSIS

1. Case 1 – Meridian Management Corporation versus General Services Administration

a. *Summary of Case 1 Facts*

This case involves a bid protest heard by GAO brought by Meridian Management Corporation claiming that the General Services Administration (GSA) may not exclude a technically acceptable proposal from the competitive range without considering that proposal's price and that the solicitation failed to put offerors on notice that they would be required to perform specialized operations in laboratories.

GSA had solicited proposals for,

...a base period (of 12 months) and two option periods (of 12 and 36

months, respectively) to operate and maintain the mechanical, electrical, utility, and interior and exterior architectural/structural (A/S) system in the four facilities...The solicitation provided for award to the offeror whose proposal represented the best value to the Government in terms of the total evaluated price, experience, and past performance.[Ref. 14]

The evaluation criteria in the proposal noted that past performance and experience combined would be more important than price, but as proposals became more equal, price on these issues would probably become more important.

After receipt of all the proposals, the Contracting Officer determined that there were too many highly rated proposals for an efficient negotiation and limited the competitive range by eliminating all proposals except those with the highest past performance and experience scores and the lowest prices because competitors outside this range were not deemed to have a reasonable chance to be awarded the contract.

Meridian's proposal had met the price standard to be included in the competitive range, but fell short in the experience and past performance evaluation criteria and thus, Meridian was not included in the competitive range, prompting this protest to GAO.

b. Meridian Management Corporation's Protest

Meridian argued that GSA's assigned past performance scores of "not applicable" in an area where they lacked experience and then incorrectly included that score as part of the overall score as it may have unfairly penalized Meridian. The Contracting Officer agreed that the scores for all offerors without laboratory experience needed to be recalculated, but found that, "Although Meridian's score improved ...as a result of the re-scoring, the scores of all the other offerors improved as well, leading the

Contracting Officer to raise the cutoff for inclusion in the competitive range”[Ref. 14]. This change in the competitive range excluded Meridian even with their adjusted experience and past performance scores. Meridian argued “...it was improper for the agency to exclude it from the competitive range without any consideration of its price”[Ref.14]. Meridian argued that the Government’s own rules, FAR 15.304 (c) (1) required that cost or price to the Government must be included in every RFP as an evaluation factor, and that agencies are required to consider cost or price to the Government in evaluating competitive proposals [Ref.2]. The contractor argued that this requirement means that an agency can not exclude a proposal that is technically acceptable without taking into account the relative cost or price of the proposal. Meridian argued that even after the re-scoring of the best value evaluation factors of experience and past performance, the Government eliminated them from the competitive range without taking the cost or price into account as required by the FAR.

The agency gave no consideration to the fact that Meridian’s price...was considerably lower than that of one of the competitive range offerors whose technical score, while above the cutoff, nevertheless was very close to Meridian’s score.[Ref. 14]

Meridian also argued that the solicitation failed to inform the offerors that the contract would require them to perform specialized operation and maintenance services in the laboratories. Meridian argued that GSA’s unwillingness to allow the offerors to visually inspect the laboratories denied them the ability to determine if there was any equipment present that would require specialized service. Meridian’s proposal did not specifically address the special requirements, because they were unaware of this portion of the requirement; and although Meridian did not disagree with the COFD, in that laboratories require complex services, they asserted that if GSA expected the

awardee to perform these specialized tasks then the solicitation should have defined the specialized requirements. Meridian contends that had the specialized requirements been a part of the solicitation they would have modified their proposal to address the requirement.

c. GSA's Response

GSA responded to the protestor's accusation that the requirement was not completely defined in the solicitation by stating that offerors were placed on notice of the specialized requirement in the laboratories. The GSA solicitation called for the contract awardee to provide service in the Drug Enforcement Agency, Environmental Protection Agency, and Federal Bureau of Investigation laboratories located in the Federal buildings. The GSA Contracting Officer also contended that the offerors were allowed to tour the buildings, excluding the laboratories, and to raise concerns about the specification prior to submitting a proposal.

GSA contended that its solicitation met the minimum requirement.

A procuring agency must provide sufficient information in the solicitation to enable offerors to compete intelligently and on a relatively equal basis....An agency can accomplish this by furnishing offerors with sufficiently detailed information in the solicitation or, to the extent the agency is unable to furnish the necessary level of detail, by giving offerors the opportunity to obtain such information on their own through site visits.[Ref. 14]

GSA contended that all parties were allowed to visit the sites and were granted access to all areas except two of the laboratories, but they were allowed to ask questions regarding the specialized equipment. The solicitation further pointed out the temperature and humidity levels must remain constant and that the laboratories operated

d. GAO's Findings and Recommendation

GAO concluded that GSA was in error when it failed to consider the price of each proposal, when the Contracting Officer used only experience and past performance as the criteria for determining those offerors who would remain in the competitive range.

GAO also determined that the RFP was not specific enough as to the type and scope of work to be performed in the laboratories, and did not make adequate provisions for potential offerors to be able discover the overall requirement.

GAO upheld the protest and recommended that GSA amend the RFP to include the specialized laboratory requirements. GAO also recommended that in making the new competitive range determination, GSA take experience, past performance and price into consideration.

The digest of the GAO ruling was,

Agency may not exclude a technically acceptable proposal from the competitive range without taking into account that proposal's price.

Solicitation for operations and maintenance services at two federal buildings and two parking facilities did not put the offeror on notice that they would be required to perform specialized operations and maintenance services in laboratories housed in those buildings, given that the solicitation did not in any way refer to the specialized services and offerors were not given the opportunity to visually inspect the laboratories themselves to determine whether equipment requiring specialized service was present.[Ref. 14]

GAO also recommended that GSA reimburse the protestor for the costs of filing and pursuing the protest, to include reasonable legal fees in accordance with GAO's Bid Protest Regulations.

e. Conclusions from Meridian

It was determined that GAO correctly concluded that GSA was in error when it failed to consider the price of Meridian's proposal after the re-scoring had brought the experience and past performance scores so close to the competitive range. There was concurrence with GAO's assertion that GSA had failed to follow the legal requirement to ensure that price or cost is always evaluated in considering competitive proposals. GAO was also correct in determining that the RFP was not specific enough as to the type and scope of work to be performed in the laboratories.

The glaring omission from GAO's finding was its failure to reconcile GSA's evaluation criteria as spelled out in the RFP with the method used by the Contracting Officer to apply it. The RFP stated that as past performance and experience scores got relatively tighter, price would become a more important evaluation factor. However, in practice, the Contracting Officer attempted to eliminate Meridian despite the relatively tight experience and past performance scores with an offeror in the competitive range without giving any consideration to the Meridian's price advantage. Hence, the conclusion that GAO failed to point out that GSA had failed to follow the evaluation criteria they had listed in their own RFP.

If GSA had written the RFP so that the competitive range had been determined by some fixed combination of past performance, experience, and price; they could have possibly avoided this protest. The fact that GSA did not follow its own

procedure could lead to the perception that they were acting in an arbitrary and capricious manner. It appears that GAO was correct to recommend the revision to the RFP, but that GSA should have revisited the source selection plan to determine how they were truly going to evaluate offerors so that a complete and accurate plan could have been used to alert potential offerors as to the relative importance of the various evaluation factors.

2. Case 2 - Ryder Move Management Inc. v. United States and Associates Relocation Management Company Inc., Cendant Mobility, Interstate Relocation Service Inc., and The Pasha Group.

a. Summary of Case 2 Facts

This case is a post-award suit brought before the U.S. Court of Federal Claims by Ryder Move Management in an attempt to force the Government to reopen the bid process because the plaintiff's financial risk was incorrectly evaluated and that the Government had not conducted a *best value* trade-off analysis.

The Department of Defense was pursuing its Full Service Moving Project (FSMP) with seven separate contracts for commercial move management and relocation services. Ryder filed this suit seeking an injunction against DoD to stop it from proceeding with the contract awards and to force it to reopen the competitive bid process due to its alleged failure to conduct a proper procurement. Thereafter, The Pasha Group; Associates Relocation Management Company Inc.; Cendant Mobility; and Interstate Relocation Service Inc. petitioned the court, and were granted, to intervene. All of the intervenees were awarded one of the seven contracts.

Ryder filed an amended complaint in search of a preliminary injunction to order DoD to cease issuing work orders against the contracts until resolution of the suit.

The court conferred with the parties and reached agreement so the preliminary injunction and case resolution could be completed expeditiously.

The suit originates with the Army's FSMP, which was an attempt to streamline the movement of service-members household goods in conjunction with permanent change of duty station orders. The Army Communications Electronics Command (CECOM) had the lead in designing the acquisition plan and then implementing the program.

At the pre-solicitation conference, the Contracting Officer informed the potential offerors that the Army would use Dunn & Bradstreet (D&B) to provide analysis for the financial risk assessment portion of the proposal evaluation. A representative from D&B was on hand and informed all potential offerors that they were welcome to review the data D&B had on file for each of the companies. D&B was a recognized expert in the field of commercial business financial analysis and had been providing similar services to the General Services Administration and other Government agencies.

The FSMP RFP was actually two RFP's, one competitive solicitation for household goods transportation and one competitive solicitation for move management services. The move management solicitation required the offeror to submit a proposal volume for past performance/experience, financial data, overall technical proposal, technical statement of requirements, price, and a small business subcontracting plan.

The FSMP solicitation provided a description of the factors and subfactors that would be evaluated, and the basis upon which the award would be made...Offerors were advised that 'any award(s) to be made will be based on the best overall (i.e., best value) proposal that is determined to be the most beneficial to the Government, with appropriate consideration given to the four evaluation factors: Overall Performance Risk, Technical, Statements of Requirements, and Price.' The overall performance risk factor

consisted of two subfactors of equal weight: past performance risk and financial risk. Potential offerors were informed via the solicitation that the overall performance risk factor would be the most significant factor.[Ref. 15]

The Army issued six amendments to the solicitation clarifying the Army requirement for the financial risk subfactor, including an assessment of the offeror's "profitability, liquidity, and solvency"[Ref. 15]. The RFP also stated that a consolidated financial package could be submitted if the offeror were a corporate subsidiary and it provided the required format for such a submission. Ryder offered a performance guarantee letter from its corporate parent, Budget group Inc.

The RFP also required that each company submit a separate proposal for each of the 10 geographic areas of the countries, called Statements of Requirements (SOR). DoD received a total of 21 proposals, with Ryder bidding on seven SOR and several of the other offerors submitting proposals on more than ones SOR. Ryder also submitted a letter informing the Government and D&B that they would be submitting the financial data from their parent, Budget, because Ryder "...lacked stand-alone public financial statements"[Ref. 15].

D&B completed a financial risk analysis based on Budget's submission for Ryder and other information available to them. One data point was a comparison of Ryder and the competitors in their market. For the purpose of this analysis D&B had classified Ryder as a local trucking and storage company vice the classification of the Budget Group. The D&B analysis rated Ryder as a "moderate" financial risk on the basis of comparing Budget's liquidity, operating profit (a lose in the case of Budget), and debt to equity ratio compared to other local trucking and storage companies.

During the Contracting Officer's evaluation, 15 items for negotiation or communication were brought to the attention of Ryder by the Contracting Officer, however, none were related to D&B's rating of Ryder as a moderate financial risk. DoD evaluated Ryder's proposal in accordance with the steps spelled out in the RFP and rated them favorably in the areas of technical, SORs, and price, but rated Ryder as "moderate" for the overall performance risk with specific concerns about Budget's unfavorable leverage ratio, net loss, and debt to equity ratio.

The Source Selection Authority, in this case, the Contracting Officer, awarded the 10 SORs to companies that had been evaluated as providing the best value to the Government. All of the awardees had received grades of "low" during the performance risk evaluation. In the final evaluation, the Contracting Officer had eliminated all offerors with low performance risk grades from further consideration for the award.

The Contracting Officer debriefed Ryder to inform them why they had not been selected and pointed out that Ryder had not been considered for the award because they had been graded as a "moderate" performance risk, and only offerors with grades of low risk had been selected.

Ryder had initially challenged the award of the contract through the GAO protest process. However, Ryder subsequently withdrew its protest with GAO and commenced its suit before the U.S. Court of Federal Claims. Four of the awardees; Pasha, Associates, Cendant, and Interstate were granted motion to intervene.

b. Ryder's Claim

Ryder's claim involves four claims of missteps by the Government that may lead to the Court to grant injunctive relief. First, the Contracting Officer may be considered arbitrary and capricious in evaluating Ryder's financial risk. Second, the failure of the Contracting Officer to raise the issue of financial condition is evidence that there might be a failure to conduct meaningful discussions. Third, Ryder claimed that even with a risk of "moderate" they should have been evaluated on the overall package as part of the *best value* trade-off analysis. Finally, Ryder claimed that the Contracting Officer unfairly treated their proposal because she had given Pasha a "low" overall performance risk despite having graded them as a "moderate" financial risk.

Ryder's primary contention was that the Contracting Officer was arbitrary and capricious in her evaluation of the financial condition of Ryder, which had used the financial information of the parent company, Budget. Ryder supported this contention with affidavits that pointed out that if the Contracting Officer had evaluated the Budget financial data against other companies in the car rental business, she would have seen that the debt to equity ratio was within the range of other car rental companies. The affidavits also pointed out that a detailed examination of the loss suffered by the Budget Group would have revealed that it was the result of certain one-time charges unique to the car rental marketplace. Ryder contends that D&B incorrectly evaluated their risk by not comparing the Budget Group data to similar car rental companies, and that if the evaluation had been done correctly, they would have been graded as a "low" performance risk.

Ryder's second assertion was that the Contracting officer failed to conduct meaningful discussions, because she failed to bring to light any concerns over the financial condition of Ryder or ask for clarification on any of the provided information.

Ryder's third concern revolved around their claim that the Contracting Officer made a fatal error by eliminating 5 offerors, Ryder included, from the competitive range, because all five had been graded as "moderate" performance risks. Ryder contends that from the competitive range should have been brought forward to final consideration under the *best value* trade-off analysis. Ryder contended that by eliminating the "moderate" risk companies prior to performing the best value trade off analysis, the Contracting Officer had violated the evaluation criteria spelled out in the RFP.

Ryder's final contention was that the Contracting Officer had treated them unfairly relative to another offeror whose marks had warranted a grade of "moderate" performance risk, but who had received a grade of "low" from the Contracting Officer and been awarded one of the contracts. As proof of the unfair treatment, Ryder pointed out that Pasha had received the same scores as Ryder in the two subfactors that comprised overall performance risk, yet Ryder was graded as "moderate" and Pasha was upgraded to "low" risk. Ryder alleged that unequal grading proved the Contracting Officer was biased against them and failed to conduct a fair and impartial evaluation.

c. CECOM's Response

CECOM countered Ryder's allegations through a declaration that the Contracting Officer had,

...performed a trade-off analysis, which encompassed each of the

proposals—including plaintiff's (Ryder's) proposal—within the competitive range for each of the 10 individual Statements of Requirements. In doing so, I considered the Overall Performance Risk assessment, the Technical and Statement of Requirements Factor ratings and the evaluated price for each offeror.[Ref 15]

The Government also had to correct the record because of a transcription error that had listed the industry profit norm as +7.0% whereas 2.4% was the correct figure. This came to light as a result of the Government reviewing the record for the suit, comparing Ryder's proposal against industry norms. However, the declaration contended that the correct number was used by D&B in its analysis and thus the overall performance risk grade of "moderate" was correct and not impacted by the transcription error.

In response to Ryder's claim that the risk evaluation was incorrect, because D&B had compared Budget's financial situation against the wrong peer group, the Government pointed to the fact that the offerors were told the financial information was going to be compared against the primary industry category of the offeror. Since Ryder was the offeror, not the Budget Group, the Government contended that D&B correctly used this as the financial submission for Ryder since they had no independent financial statements of their own. D&B therefore was correct to use Budget's data to compare Ryder against its primary industry classification and not the industry classification of the parent company. The Government pointed out that they had acted consistently in this manner, because Ryder was not the only offeror to submit the financial data of its parent company and each company was treated the same.

The Government's response to Ryder's claim that the failure to raise the issue of financial risk during discussions indicates a failure to conduct meaningful

discussions was that the Government only needs to consider elements that are relevant to potentially deficient or ambiguous information contained in the proposal. The Government points out that the purpose of the discussions is to advise offeror's within the competitive range of deficiencies in the information provided in their proposals to give them the opportunity to alter or clarify in order to meet the Government's requirements, the, "...scope and extent of these discussion are a matter of contracting officer judgment" [Ref. 15]. The Government contended that the financial data was not considered to be deficient or unclear by the Contracting Officer, and that Ryder did not challenge the data but only DoD's interpretation of the data. The Government's stance was that the FAR does not require discussions to include the opinions that are drawn from data.

The Government countered Ryder's third assertion, that the Contracting Officer had erroneously excluded them from the best value trade-off analysis, by stating the record showed that all offeror's were given appropriate consideration but that the finalists were comprised of those companies that were graded as a "low" performance risk. The Contracting Officer's affidavit pointed that the finalist's proposals had been compared to the others, Ryder included, and that the finalists were the only ones that warranted further consideration. The Government pointed out that the RFP had been clear in indicating that performance risk was the most important evaluation factor.

In countering Ryder's contention that they had been treated unfairly, because Pasha had received the same scores, but had been graded "low" risk, the Government stated Contracting Officer used sound business judgment and evaluated each fairly. Specifically, the Government showed that there were items of distinct

disadvantage in Ryder's proposal that were not present in Pasha's: profitability, past performance, and debt to equity ratio. In all of these key factors Ryder was significantly below the peer norms, while Pasha was close to the norms. In the Contracting Officer's judgment, these factors meant that Pasha's proposal represented a "low" performance risk.

The Government countered each of the claims leveled by Ryder through the use of the contract record, a correction, a declaration, and an affidavit to demonstrate that they had followed the RFP and acted in a fair and consistent manner.

d. Court of Federal Claims Decision

The U.S. Court of Federal Claims found that the Contracting Officer's evaluation was, "...not unlawful or irrational"[Ref. 15]. The Court found in the Government's favor, denied Ryder's injunction request and deemed each party responsible for its own costs. In its response, the Court specifically ruled on each of Ryder's contentions so that a precedent could be set or reaffirmed across all issues before the Court. The Court noted for the record that the aggrieved bidder must prove that there was no rational basis for the agency's decision and that the Court may not substitute its judgment for the agency's, but may determine if that judgment was, "...the result of a considered process, rather than an arbitrary and capricious choice based on factor lacking any intrinsic rational basis"[Ref. 15].

Also, the Court ruled that the Contracting Officer was not irrational in comparing Ryder's submitted financial data, actually Budget's data, to companies in the peer group of the offeror and that the Government was consistent in that it followed the same process for Cendant and Associates. The fact that D&B could have evaluated the

financial data in a different manner does not by itself mean that the way they did evaluate it was not based on a rational process. Ryder failed to show that D&B's evaluation was plainly wrong nor did Ryder prove that even if another method of comparison had been used that they would have been assured a performance risk grade of "low." For these reasons, the Court ruled that the D&B risk evaluation was not irrational.

The Court ruled that Ryder's claim of that the Contracting Officer failed to conduct meaningful discussions because she failed to bring the financial risk question to the forefront was within the scope of her judgment. The Court agreed that the discussions designed to clarify data are quite separate from discussions regarding any opinions drawn from the data and ruled that the Contracting officer was under no obligation to discuss items which were not subject to correction. Ryder did not object to the data itself, but only to the conclusions drawn from that data. The Court had previously stated, they would not substitute their own judgment for that of the agency provided the agency's is rooted in a rational basis.

The Court found the affidavit provided by the Government when taken in context of the entire record does represent that the Government acted in a consistent manner with respect to the evaluation factors and conducted a best value trade-off analysis for all offerors in the competitive range. The Court explained the allowing of the Government's affidavit and declaration by stating, "While the Court looks most heavily to the agency's contemporaneous record of the decision-making process, the court may consider post-protest explanations" [Ref. 15]. The Court found that the record and the post-award statements proved to its satisfaction that the best value trade-off analysis had been completed.

The Court found that the Government had treated all parties fairly and did not demonstrate the bias claimed by Ryder by ranking Pasha as a “low” performance risk and Ryder as a “moderate” performance risk despite both companies receiving the same two subfactors that made up performance risk. The Court ruled that the Contracting Officer had used her business judgment in weighting the mitigating factors of Pasha’s proposal to determine that they were a “low” performance risk. The Court did not second-guess that judgment but rather found that she had a reasonable premise for the decision.

Based on all of these factors, the Court of Federal Claims found that the award of the contract had been proper and found in favor of the Government.

e. Conclusions from Ryder

It was determined that the court was correct in its decision and the evaluation of the facts of the case. However, this case did highlight a few areas where CECOM could have done some things to improve the process and potentially avoid the time and cost of the suit.

One of the areas where CECOM could have improved was in the pre-solicitation research, and overall design and communication of the performance risk evaluation. Even though the Court found nothing wrong with the way CECOM conducted itself in this area, detailed market research would have revealed that there was going to be some problems with the companies that had no independent financial data. D&B offered to show the potential offerors the data the D&B had on each of their companies, however the process used did fail to take into account some unique characteristics of Budget’s business. This left Ryder under the impression they were not

treated fairly, which is contrary to one of the goals of Federal procurement, which is to treat all parties fairly and reasonably and to be perceived as doing business this way.

It appears that the Contracting Officer also failed to correctly document the file and this led to some of the perception problem. The fact that CECOM had to enter a correction to the documentation as it sat before the court, and that the Contracting Officer had to enter an affidavit to explain the reasoning behind her inclusion of Pasha and rejection of Ryder despite them both having been graded as “moderate” performance is an indication that the file could not stand on its own and needed further amplification. The error of showing the industry average profit at 7% and then having to change it 2.4% during the proceeding is particularly troubling, because profit was one of the criteria used to eliminate Ryder from the competitive range. This case demonstrates the critical need to document the file so the decisions and the logic used to arrive at them can be determined by an adjudicating authority without additional input from the Contracting Officer.

3. Case 3 – Stratos Mobile Networks USA v. United States Navy and COMSAT Corporation

a. Summary of Case 3 Facts

This case was an appeal heard by the U.S. Court of Appeals for the Federal Circuit of a case originally heard by the U.S. Court of Federal Claims. The Court of Federal Claims had found that the Government procurement was illegal and granted a summary judgment in favor of the plaintiff. The defendants, U.S. Navy and COMSAT Corporation, “...sought a review of the judgment of the Untied States Court of Federal Claims, concluding that defendant United States’ solicitation of a contract was improperly conducted and ordering injunctive relief”[Ref. 16].

The lower court, the Court of Federal Claims, found the procurement illegal, because the Request for Proposal (RFP) contained a latent ambiguity regarding the manner in which the bids were to be evaluated. The lower court had issued an injunction requiring the Navy to rewrite the RFP, re-bid the contract, and transition the contract to the Plaintiff, Stratos, if the plaintiff won the re-bid.

In March of 1999 the Navy's Space and Naval Warfare Command (SPAWAR) issued a RFP for an indefinite-delivery, indefinite quantity (IDIQ) contract for the procurement of leased satellite-based communication services through the International Maritime Satellite (INMARSAT) service.

The RFP stated under the evaluation sector:

The Government will award a contract...to the responsible offeror whose offer conforming to the solicitation...will be most advantageous to the Government, price and other factors considered...the award will be made to the offeror whose proposal meets the minimum technical requirements and offers the best value to the Government in terms combination of past performance and price...Prices will also be evaluated for reasonableness using the items not-to-exceed quantities...In considering the reasonableness and realism of the price proposals, the Government may determine that an offer is unacceptable if the prices proposed are materially unbalanced between line items...an offer is unbalanced when: one it is based on prices significantly less in cost for some work and prices are significantly overstated in relation to the cost for other work; and two, if there is reasonable doubt that the offer will result in the low overall cost the Government even though it may be the lowest evaluated offer, or it is so unbalanced as to be tantamount to allowing an advance payment.[Ref. 16]

The RFP stated that the price evaluation would be based on the anticipated order amounts found in the RFP, but these estimates in no way shall be construed as obligating the Government to place orders in strict compliance with these estimates, as a matter of law the Government is only obligated to purchase up to the minimum quantity

of an IDIQ contract. The RFP also informed potential offerors that the Government would be taking any discounts that were offered and applicable in the price evaluation determination "...without regard to the number of channels ordered or without regard to the number of months funded by the Government" [Ref. 16]. The RFP also included an example on one way of structuring the discounts but did not require that the discounts had to be structured in this manner.

Stratos and COMSAT submitted proposals in accordance with the RFP and both satisfied the technical requirements, as well as received grades of excellent in the past performance section of the evaluation. The structure of the discounts differed greatly in the proposals and this is where the award was finally decided.

Stratos had structured their discounts in such a manner that the Navy would get the discounted price only after it had built up a specified channel-month ordering amount. The structure of Stratos' discount was such that the Navy had to match or exceed the anticipated amounts given in the solicitation, any amount short of the anticipated quantity reset the cumulative counter to zero and made it more difficult to reach a discount point in the follow on month. In other words, Stratos' discount was tied directly to the anticipated amounts shown in the solicitation and the Navy would receive a discount only if it exceeded those anticipated amounts.

COMSAT's discount structure followed the example set forth in the RFP and calculated the discount based on the annual usage and thus was dependent only on the quantity ordered over a 12-month period.

Upon receipt of the proposals, the Navy sought to clarify the pricing and discount structure of Stratos. The Navy also informed Stratos that it could not prepay for

service, which was one of the conditions Stratos had imposed for the Navy to be eligible for discounts. Stratos submitted a revised proposal, to which the Navy responded:

...it appears that the discounts you are offering ...apply to the exact anticipated quantities included in the RFP for price evaluation. Although the price evaluation quantities constitute a reasonable estimate of future order quantities, it is impossible to predict exact order quantities over the five-year ordering period. Accordingly, the RFP advised that evaluation of the anticipated order amounts would not obligate the Government to place orders in that manner.[Ref. 16]

Based on the final proposals submitted, the price for the anticipated quantity was \$65,254,030 for COMSAT and \$64,221,920 for Stratos. At the upper limit, the not-to-exceed-price for COMSAT was \$111,951,000 and \$126,100,800 for Stratos.

The Navy awarded the contract to COMSAT based on its evaluation that the COMSAT discount structure was more flexible, and thus, more advantageous to the Government because the uncertainty of the IDIQ quantities would allow the Navy to realize lower expected costs with COMSAT's more flexible discount structure.

The Navy justified the award because COMSAT's undiscounted price was lower than Stratos'; Stratos' lower evaluated price was entirely dependent on the Navy ordering in the same manner as the anticipated quantities; the restricted conditions for receiving the Stratos discounts were unlikely to materialize; COMSAT's discounts were a better value to the Government because they were more flexible; and, the not-to-exceed price difference of \$14,149,800 at the upper limit significantly favored COMSAT.

b. Stratos Mobile Networks' Claim

Stratos challenged the Navy's evaluation in the U.S. Court of Federal Claims, by stating that the RFP's direction was not followed, specifically, that the Navy

failed to follow RFP directions to evaluate the prices based strictly on the anticipated order amounts set forth in the RFP for the very purpose of evaluating prices.

Stratos also challenged the evaluation of specific evaluation of COMSAT's past performance as being graded excellent in spite of evidence to the contrary.

c. Navy and COMSAT Response

The Navy emphasized the negative impact on national security if it was forced to re-bid the contract and subsequently change from COMSAT to Stratos in the middle of the five-year performance period.

COMSAT, as co-defendant, rebutted Stratos' assertion as to any significant issues in their past performance that would have negated the evaluation of excellent they have received from the Navy.

The Navy and COMSAT argued that the RFP had clearly pointed out that the Navy would also evaluate the "reasonableness and realism" of the proposals to determine the probability that the *best value* would be achieved under each of the proposals.

d. Court of Federal Claims Decision

The Court of Federal Claims, the trial court, agreed with the Navy's assertion that "...it was in the best interest of national security that the Navy have...continuous, uninterrupted access to INMARSAT-B..."[Ref. 16]. However, the lower court found that the Navy had abused its discretion, and its awarding the contract to COMSAT had been arbitrary and capricious because it had not more closely followed the RFP in evaluating price.

The lower court had issued an injunction to require the Navy to rewrite the RFP, re-bid and re-evaluate the contract, and if Stratos won the new competition, to transition service to Stratos in one year. This injunction, "...discounted the national security threat posed by forced service transition, but sought to mitigate any such harm by delaying any transition to permit expedited appeal" [Ref. 16].

e. Court of Appeals for the Federal Circuit Decision

The Court of Appeals for the Federal Circuit, the appellate court, reviewed the lower courts decision based on an appeal and found that,

The RFP had to be read in of its purpose and consistently with common sense. The court held that, based on the nature of the indefinite-delivery, indefinite-quantity contract and the specific terms of the RFP, there was no ambiguity in the RFP, latent or otherwise, and therefore no error sufficient to justify judgment for the plaintiff. Thus the court reversed the judgment and vacated the injunction. [Ref. 16]

The appellate court found no ambiguity in the RFP, that it was clear in stating that the Government was looking for best value in terms of price and past performance. However, the RFP was equally clear of the anticipated amounts to be used for price evaluation purposes and that they in no way bound the Government to order any more than the minimum quantity. The appellate court also found that the trial court had erred by reading the contractual provision for evaluating a price based on the anticipated quantities without the benefit of the entire context of the contract. The court found that in order to determine the true intent of the Government, a complete reading of the RFP was necessary and the entire evaluation scheme needed to be applied to the facts. When the court did this they found that while the price determination at the anticipated price was a consideration, "...nothing in the RFP makes that consideration exclusive, and the RFP

makes clear that the lowest evaluated offer need not be accepted 'if there is reasonable doubt that the offer will result in the lowest overall cost to the Government...'"[Ref. 16].

The Court of Appeals for the Federal Circuit found that Navy's award of the contract to COMSAT was not arbitrary or capricious and had been done in accordance with the law.

f. Conclusions from Stratos

This case clearly represents the need to have legal advice intimately involved in the acquisition process in order to give advise to the Contracting Officer, SSA, SSAC, and SSEB as to how certain decisions can be interpreted by the courts. The attorney's must make themselves familiar with not only the precedents that have been set, but also the tone the court has taken with regard to recent decisions on issues that may be similar to the current *best value* acquisition. Since *best value* involves the Government making a judgment, that judgment must be backed up with reasoning that can withstand the scrutiny of the judicial branch. The primary concern in this case is that two courts can hear the same set of facts and yet arrive at totally opposite decisions.

It appears the only thing that may have improved the Navy's already strong in the trial court was if the RFP had stated that the offeror's proposals would be evaluated using weighted net present value costs to the Government at the minimum, anticipated, maximum, and four other quantities based on the probabilities of that level of usage. This RFP would then have been backed up by an evaluation plan that would have weighted the max, min, anticipated, and four other amounts based on a predetermined scale, removing any leeway for the trial court to find a latent defect. This evaluation plan would also have forced each of the offeror's to provide the best possible value over the

spectrum of alternative quantities, because they would not have known the weighting factors. This plan would have insulated the Navy from the claim of an ambiguous RFP and potentially eliminated Stratos' suit.

4. Case 4 - Defense Systems Company, Inc. vs. United States Army

a. Summary of Case 4 Facts

This case involves the termination of a *best value* contract, brought before the ASBCA in June 2000, because of a contractor claim that the Government breached the contract in bad faith, which led to the demise of Defense Systems Company, Inc. (DSC) as a viable concern. The claim by DSC seeks to recover \$72M for the breach and other damages detailed in the case.

This case centers on the HYDRA-70 rocket, the most widely used rocket in the world. The rocket is composed of three primary components: the rocket motor, the warhead, and the fuse. These components were assembled by a Load, Assembly, and Pack (LAP) contractor, but the program had always been managed by the Army, most recently the Army Industrial Operations Command (IOC-Rock Island). The procurement and quality assurance were collocated at Rock Island with the program office, while the design agent for the warheads and fuses was the Army Research Development and Engineering Center (ARDEC) at the Picatinny Arsenal in New Jersey. The design agent for the warhead was the Naval Surface Warfare Center (NSWC) in Indian Head, Maryland.

The Army Material Command had directed its subordinate command; IOC-Rock Islands to procure the Hydra-70 rockets as a system in order to shift the administrative and logistical burden for the component contractors from the Government

to one contractor, who would then be responsible for the entire system. In 1991, IOC-Rock Island had issued a request for unpriced technical proposals to be submitted in order for the Army to decide which proposal's would meet the technical requirements for the Hydra-70 rocket without the contractor being required to submit detailed pricing data. From those contractors who submitted acceptable proposals, the Army requested price proposals for each of the eight line items. The RFP called for 232,764 rockets, motors, and warheads and had three option periods attached so that the Government could extend the period of the contract based on the assessed performance of the awardee.

Based on the Army's assessment of the unpriced proposals, two companies were requested to submit pricing proposals in order for the Army to select an awardee. The two remaining offeror's were DSC and Hercules/CMS, which was a joint venture of Hercules Inc. and Conventional Munitions Systems.

DSC, a wholly owned subsidiary of BEI Electronics, Inc., was founded in 1952 in Arkansas and was considered a "one product line, one customer company" [Ref. 17]. Since this was the only business DSC was in, they decided this contract was a "must win" and developed the pricing strategy to "bid low as low as it could and work itself out of the hole" [Ref. 17]. This strategy was based on DSC's need to win the contract and DSC's expectation that Hercules/CMS would have a very aggressive pricing strategy in order to win the contract.

This strategy was reflected in a pre-bid briefing DSC gave to the officers and directors of its parent, BEI...A briefing chart entitled "competitive assessment HYDAR-70 Bid Scenarios" showed that DSC believed that if it were to bid \$179M, its confidence level in winning the contract was only 20 percent. Its confidence level progressively increased to 60, 90, and 100 percent with a progressively lower bid of \$169M, \$159M, and \$149M respectively. [Ref. 17]

DSC's confidence that a bid of \$149M would guarantee the contract award to them was predicated on the assumption that Hercules/CMS would not bid below the probable DSC manufacturing costs. DSC also assumed that they could use "mistakes and corporate muscle to regain profitability via Government and suppliers"[Ref. 17]. The mistakes would entail defining the errors in the TDP and charging the Government for the engineering effort to correct the TDP and to change the process. A chart at the pre-bid briefing given to the company officers showed that if DSC won at a price of \$149M, they would have to take several steps to make it a profitable endeavor, including:

1. Looking for mistakes in the Technical Data Package and charge the Government to correct it.
2. Set the stage for later protests that the option structure of the contract was an improper vehicle for this acquisition.
3. Work on contract modifications to allow separate billing of the pre-production evaluation effort.
4. Propose a facility/storage contract or modification to the existing contract that would become effective after the delivery of the existing backlog.
5. Work vigorously on business development/cost reduction plans.[Ref. 17]

DSC's internal estimate on the cost to perform the technical aspects of their offer was \$181M, or \$32M above the \$149M price they were going to offer for the eight line items in the contract. DSC was confident that it could recoup some of this \$32M shortfall through correcting a problem with the fuse and Ram Air Deflector (RAD) that DSC had previously become aware of when performing as a subcontractor for another Hydra-70 component contractor. DSC believed that the Government's Technical Data Package (TDP) contained an error that led to this specific problem, and could possibly recover by making the correction and charging the Government for the modification.

Another set of key assumptions DSC made regarding the contract involved the length and breadth of the entire effort on which they were bidding. DSC assumed that,

...all of the options would be exercised,...that a significant amount of additional hardware would be procured because the solicitation quantities were so low by historic standards...and that it would get some FMS add-ons during the performance of the contract and that it would realize 10,000 rockets per year on an international sales basis.[Ref. 17]

DSC counted on the exercising of the options in order to extend the time available to recoup the loss and make the program profitable. DSC also relied on the prospect of the additional units available through FMS and direct foreign sales to increase the quantities of rockets and move the program to profitability. DSC assumed there would be additional FMS sales because the solicitation didn't have a separate line item for FMS and the Army had always included FMS units as a separate line item in the past. DSC expected to sell 5,000 additional rockets via FMS based on their five-year sales record and an additional 10,000 rockets per year worth approximately \$20M annually through direct overseas sales. DSC knew that FMS competed directly with their direct sales, but since the solicitation included no mention of FMS, DSC concluded that there would be only an additional FMS requirement of 5,000 per year based on historical data.[Ref. 17]

BEI's discussions with DSC dealt at length with the multiple loss recovery scenarios, but ultimately led to the decision to make the \$149M bid and recover the loss via the multi-faceted recovery programs and steps to manage cash flow. DSC's internal analysis revealed that FMS and direct sales had to materialize or DSC would be required to finance \$8.2M, \$19.6M, and \$17.8M in the option periods A, B, and C respectively.

DSC would also become responsible for shutdowns caused by unavailable components and the integration of the various rocket components using their own processes, neither of which they had dealt with in their prior capacity as a LAP contractor.

Since the Army had deemed Hercules/CMS's and DSC's proposals as acceptable from a technical standpoint the price was the deciding factor as to what would constitute *best value* in this situation. DSC won the contract using the \$149M bid because the Hercules/CMS bid had been \$180M.

The first issue of contention between the Army and DSC arose out of the FMS requirement that the Army had not listed as a separate line item in the solicitation. The DFARS required that, "known FMS requirements shall be separately identified in solicitations" [Ref. 17]. Because of differences in how certain costs can be handled between a FMS line item and a Government line item, the Government is required to identify the level of FMS sales in each contract. The Government Contracting Officer admitted that the failure to identify the FMS quantities, "was an omission on our part" [Ref. 17].

Another issue arose from proposed Special Defense Acquisition Fund (SDAF) buys that are similar to the FMS program and also require that the solicitation list these items as separate line items. The primary difference is that a FMS requirement represents a firm requirement with funds attached to it, whereas a SDAF requirement represents an anticipated requirement by a foreign Government that are initially sold to the U.S. Government.

The Government modified the contract to reflect the FMS buys, but left the SDAF buys in the base line item of the U.S. Government. From June 1992 to

September 1993 several modifications were used by the Government to more clearly define the FMS and SDAF requirements in the contract.

In summary, the Government ordered 8,908 FMS rockets and 14,212 SDAF rockets under the basic agreement. It ordered 7,708 SDAF rockets pursuant to three modifications under option A. In addition, it ordered 10,881 FMS rockets and 7,084 FMS rockets under follow-on modifications. [Ref. 17]

Rather than submitting a claim, DSC chose to submit an executive summary on the FMS/SDAF issue in December 1993 seeking 'to achieve resolution of its claim by mutual agreement.' The summary confirmed that DSC offered a contract price \$32M below its estimated cost of performance. DSC contended that it had expected to 'offset the loss on the basic and option quantities' with (1) new DoD requirements, (2) FMS SDAF quantities, and (3) direct international sales. [Ref. 17]

DSC also suffered numerous quality control problems related to the contract including non-conforming lockwires, fuse failures, incomplete/inaccurate TDP, and Early Motor Blows (EMB). DSC submitted numerous Engineering Change Proposals (ECP) in an attempt to correct the technical data package and change the processes that it felt were leading to the high failure rates, but these were rejected by the Government whose inspectors had determined that DSC was not following the prescribed procedures as set forth in the TPD. The Government had started and later stopped a criminal investigation on the non-conforming lockwire after DSC had pledged to correct the problem.

Additionally, a subsequent solicitation was issued for a contractor to replace fin and nozzle assemblies and an award was made to another contractor despite the systems contract DSC had been awarded.

The quality problems led to delays in deliveries, which in turn led to a suspension of the progress payments that had been identified as critical to DSC's cash flow position when the original bid strategy had been considered.

DSC's claim before the board also requested that the Government pay for overhead and profit on the downtime caused by the Government's failure to deliver certain Government Furnished Material (GFM) on schedule.

DSC ultimately completed the base portion and option A of the contract but the Government did not consider the exercising options B and C due to the performance problems. The solicitation for the follow-on systems contract was a *best value* procurement with technical factors being weighted more than price. DSC did not submit an offer, but had agreed to become a subcontractor to Alliant Technologies. A total of four firms bid on the solicitation with Martin Marietta Ordnance System being awarded the contract. A protest to GAO that claimed the Government had failed to inform one of the offerors of deficiencies in its proposal was upheld, forcing the Government to re-compete the requirement. The follow-on system contract was also awarded to Martin Marietta after the corrections.

b. DSC's Claim

DSC claimed that the initial solicitation and contract failed to alter them to the true nature of the requirement relative to the FMS and SDAP requirements that would have been accounted for separately and would have had a direct impact on their pricing strategy from the beginning. DSC claimed that had it been notified of the true nature of the requirement, its pricing strategy would have been completely different with respect to

dollar amount per unit and the total number of units it would have projected to be able to use in their various loss recovery plans. DSC claimed,

Having failed to explicitly provide for FMS/SDAF use quantities in the contract, IOC is precluded from diverting contract quantities for FMS/SDAF use. DSC argues that the Government's failure to comply with the applicable regulations constitutes a material breach of the systems contract.[Ref. 17]

DSC also argued that the further failure of the Government to identify the SDAF quantities at the same time the modifications for FMS quantities were conducted represented a bad faith breach of an oral agreement to separate both FMS and SDAF quantities. DSC contends that the Government should be liable for damages, to include lost profits of international sales because,

It was reasonably foreseeable prior to contract award that a breach of the contract by the government would cause the loss of current and future direct international sales by DSC. DSC asserts that since its bid was substantially below that of its competitor's, it was foreseeable that DSC would aggressively pursue direct international sales of Hydra-70 rockets. DSC also argues that it was foreseeable that its direct international sales market would be adversely impacted when the Government made available below-cost contract prices for FMS.[Ref. 17]

DSC argued that the quality problems with the non-conforming lock wires, fuse failures, and Early Motor Blows (EMB) were a result of the Government not furnishing an accurate and workable TDP and that corrections that would have made the manufacturing process as effective, but less expensive were refused by the Government. DSC also claimed that the Government's initiation of the criminal investigation of the lockwire quality problem was used to delay the negotiation over the delay claim for the Government's failure to provide the GFM on schedule. DSC argued that the Government used this investigation in bad faith in order to gain a more favorable negotiating position

for the claim and that the rework forced on it by the Government was further made to delay progress payments while simultaneously increasing DSC's cost to perform. DSC further claims that the Government made a concerted, coordinated bad faith effort to delay negotiating claims with DSC in a timely manner and suspending progress payments for supposed quality issues for which the Government had superior knowledge in an attempt exacerbate DSC's cash flow problems and gain advantage.

In the case of DSC's exclusion from participation in the follow-on systems contract award, "DSC seeks the loss of the value of the company attributable to improper Government conduct in the administration of the system contract" [Ref. 17]. DSC argued that the Government's failure to exercise the options and incorrect contract administration with respect to progress payments constituted a breach of the contract.

c. IOC's response

The response from IOC to DSC's charges detailed the process by which the Government had arrived at the various decisions that led to the claims being advanced by DSC in this matter.

First, with respect to the claim by DSC that IOC failed to follow the regulations and separately identify FMS and SDAF requirements from the base requirements; the Government contends that the inclusion of various clauses related to shipment verification, preparation and submission of forms, and additional progress payments for FMS/SDAF should have alerted DSC to the possibility that the contract included FMS requirements within the quantities of the initial requirement.

Second, the Government denied that it was responsible for the quality problems encountered by DSC and that if DSC had correctly followed the TDP, it would

have produced an acceptable result. The Government did admit that the Early Motor Blows were not the result of any of the processes involving DSC.

Third, the Government strenuously denied DSC's assertion that it used the criminal investigation of the faulty lockwires as a means to apply pressure on DSC in the claims negotiations. The Government stated that a former DSC employee had come forward and said that DSC was knowingly providing defective lockwires, under this situation the only prudent thing to do was to turn the case over to an investigating authority. The Government also contended that this would not have given it any additional leverage because once it was turned over as a criminal investigation IOC had no control over the matter and could not have stopped the proceedings. The Government alleged that had DSC corrected the quality problems immediately instead of viewing that as a mistake in the TDP that required an ECP they would not have been forced to suspend progress payments. The Government also asserted that the only reason they had forced DSC to rework the quality problems was to gain a product that met the specification and was in no way an attempt to harm DSC through the suspension of progress payments and increasing DSC's cost to perform.

IOC also stated that it suspended progress payments, because of DSC's failure to meet the level of progress on the contract that would have warranted the progress payments and not in an attempt to harm the cash flow of DSC. IOC argued that for DSC's claim on this matter to be upheld, DSC would have to provide "irrefragable proof...of some specific intent to injure the contractor such as conspiracy, designedly oppressive conduct, animus or malice" [Ref. 17].

Finally, the Government argued that IOC had the right to choose whether exercising options B and C, or re-soliciting the systems contract provided a greater benefit to the Government and that it was under no obligation to exercise the options. The Government concluded that the cost of re-designing the solicitation to reflect a *best value* tradeoff with a heavier weight to the technical factors and pursing the matter through the solicitation, evaluation, and award phases represented a greater benefit to the Government than exercising the options based on the quality and schedule problems they had with DSC.

d. ASBCA's Decision

ASBCA provided a mixed decision, in some cases agreeing with DSC and in others agreeing with the Government's argument.

First, ASBCA agreed with DSC that the Government failed to follow its own regulations with respect to the separate identification of FMS and SDAF requirements in the solicitation. The Board also agreed that the Government continued this error by failing to identify the SDAF quantities at the same time that IOC was modifying the required quantities to reflect the FMS requirements. ASBCA found that DSC had provided no "irrefragable proof" that the Government had acted in bad faith and found that the, "proper remedy for failure to disclose FMS and SDAF requirements is an equitable adjustment and no damages for breach of contract." [Ref. 17]. ASBCA also found that the Government was not liable for the loss of direct international sales because these sales were not foreseeable and not directly related to the systems contract but rather an "independent and collateral undertaking" [Ref. 17] and therefore "not recoverable as a matter of law" [Ref. 17].

ASBCA also ruled that the DSC failed to prove that the quality problems, with the exception of the EMB issue, were a result of incomplete/inaccurate TDP. If DSC had followed the TDP exactly, they could have insulated themselves from the Government's claim that their failure was the direct cause of the quality problems with the Hydra-70. However, since DSC did not follow the prescribed procedures they bore the risk of quality problems due to their deviations. The EMB problem was found to be a result of the GFM, specifically propellant grains, but since the Government had paid DSC separately to screen the inventory and correct the problem no damage to DSC resulted.

The Board found that there was no proof that the Government misused the criminal justice system to improperly delay the negotiation of the delay claims brought forth by DSC. Once again, the Board found that DSC had provided no "irrefragable proof" that the Government had acted in bad faith.

Finally, ASBCA ruled that IOC had not acted in bad faith nor breached the contract by suspending progress payments and later, re-soliciting the systems contract instead of exercising options B and C. The Board found that DSC, "...failed to show that the Government's partial withholding of progress payments was motivated by an intent to injure DSC, we hold that DSC has failed to prove bad faith breach of contract..." [Ref. 17]. The Board also concluded that the Government's decision to not exercise options B and C did not constitute improper contract administration; rather the Board found that the Government was acting within its rights to make that decision, because,

...the Government as a matter of law was not obligated to exercise Options B and C, we hold the Government did not breach the systems contract in awarding the follow-on contract work to Martin Marietta. [Ref. 17]

In summary, the ASBCA found that DSC was entitled to an equitable adjustment, including interest, for a total of 8908 FMS rockets and 21,920 SDAF rockets. All other portions of the claims were denied.

e. Conclusions from DSC

It was determined that mistakes on the part of the Government and the contractor led to the demise of DSC as a viable concern. For the Government, failures included: failure to properly identify the requirement; failure to correctly judge what constituted *best value* for this acquisition; and a failure to properly determine that the offer that the price offered by DSC was fair and reasonable. For DSC, the mistakes included: bidding below cost; developing a complex strategy to recoup the losses; and not performing in accordance with the contract.

The biggest error in this case was the Government's failure to separately identify the FMS and SDAF requirements on the RFP. This led DSC to assume a larger quantity of units over which to recoup their costs and although this does not relieve DSC of the responsibility for making such a risky proposal, it was considered doubtful that DSC would have underbid on such a grand scale had they known that the quantity was limited.

The Government had failed to correctly determine what constituted *best value* in this acquisition. IOC determined that if a contractor's technical proposal was evaluated as acceptable, lowest price would be the determining factor. Thus in this case, the Government incorrectly concluded that the lowest price technical acceptable represented the greatest benefit to the Government along the *best value* continuum.

It appears the Government failed to properly determine a fair and reasonable price because the bid was below DSC's cost to perform, thus the more work they did the more they lost. This does not alleviate DSC from making a reasonable bid, but one of the things that a Contracting Officer is certifying by signing the contract is that he/she has determined the price to be fair and reasonable. The fact that DSC's bid was \$31M (17%) below that of Hercules/CMS should have alerted the Contracting Officer that DSC was trying to get the contract through "buy in" or that the bidder did not understand the scope of the requirement.

DSC's bidding strategy was considered irresponsible, because there was no way to make a profit unless all of their recovery efforts went smoothly. This ultimately led to the downfall of the company as a going concern. DSC risked the entire business on a bid where the more work they accomplished the more money they lost. Even though the Government failed to separately identify the FMS and SDAF requirements, this mistake does not relieve DSC or the BEI board of their fiduciary responsibility to the stakeholders. There were alternatives that DSC failed to explore. This contract was not a make or break effort, DSC could still have acted as a component contractor for the ultimate awardee or teamed with another company for the systems contract, either of these options would have reduced the exposure to risk that DSC ultimately put itself in.

The development of the complex strategy to recoup the losses should have been unnecessary with a well thought-out bid, but nonetheless relied on too many assumptions and the continued cash flow supplied by the progress payments, which DSC non-compliance with the contract forced the Government to suspend.

It appears that all of these errors were avoidable by the parties involved, the case represents an example of many of the things that can go wrong if a *best value* acquisition is not well thought-out or executed.

C. CHAPTER SUMMARY

This chapter analyzed four cases that represented not only the implementation of *best value* in Federal procurement but also the use of judgment by the Contracting Officer and the view of how that judgment should be exercised by various adjudicating authorities.

The *Meridian* protest before the GAO was upheld because the Government failed to define the scope of the entire requirement and prevented potential offerors from gaining insight into the true scope of the work by denying them access to the laboratories. Meridian's protest was also upheld because GSA had failed to consider price in its evaluation of offerors to be eliminated from the competitive range, even though the FAR requires that price be considered.

The *Ryder* dispute before U.S. Court of Federal Claims was denied because the Government did not act in an arbitrary and capricious manner and did, in fact, follow the solicitation. Despite winning the suit, the Government had some problems brought to light in this case, such as the failure to properly document the contract file and conducting incomplete market research prior to the solicitation.

The *Stratos* appeal before the U.S. Court of Appeals for the Federal Circuit was decided in favor of the Government, because the RFP was not ambiguous and the Navy had awarded the contract in accordance with the law.

In the *DSC* appeal, the ASBCA found that the Government had failed to follow its own regulations by not listing FMS and SDAF quantities as separate line items. This led the ASBCA to grant *DSC* an equitable adjustment based on the correct FMS and SDAF quantities. The ASBCA also found that neither the failure to list FMS and SDAF separately nor the Government's refusal to exercise the options for future years constituted a breach of contract.

Chapter V will discuss the perception by industry of the Government's use of *best value* and the use of *best value* by some commercial concerns with respect to their non-governmental activities.

V. BEST VALUE FROM A COMMERCIAL PERSPECTIVE

A. INTRODUCTION

This chapter will define best value from the perspective of a commercial company doing business with the military services, as well as show some of the similarities and differences between the Government's implementation of *best value* and that of the commercial sector. Additionally, this chapter will highlight the perceptions that industry personnel have expressed regarding the Government's interpretation of how *best value* is defined and implemented.

The industry sources used for this chapter were interviewed using the questions outlined in Chapter III. The specific sources and their companies will remain anonymous, but one was a technology company and the other a service company. Each company interviewed was a leader in their respective industry.

B. BEST VALUE DEFINED FROM A COMMERCIAL PERSPECTIVE

The definition for *best value* used by the commercial sector is very similar to the Government definition derived in Chapter II, i.e., the process by which the Government develops a requirement that involves a trade-off between two or more evaluation factors. The procurement manual for the technology company defined *price philosophy* as,

Prices paid for products and services should be fair and reasonable. Initial unit price is only one factor in evaluating the cost of a product. The objective is to buy value-which involves quality, reliability, delivery, maintenance, and similar considerations. Therefore, awards are placed with responsible suppliers at prices calculated to result in maximum value and the lowest ultimate overall cost to [the company] and our customers.[Ref. 18]

The technology company also documented its trade-off judgment in practice by using a memorandum that defines both price/cost analysis and a justification as to why the selection constitutes *best value* to the company. The technology company also uses a standardized evaluation that specifies evaluation criteria. Broad evaluation criteria used on a May 2001 *best value* procurement included “Technical,” “Schedule,” and “Cost.” Some evaluation team members scored based on tenths of points others on full points, but since the individual evaluators remained consistent throughout the process it yielded a nominal ranking. The team was then able to discuss the specifics of each requirement and rank-order each offeror.[Ref. 19]

The “technical” aspect was a threshold requirement. If the proposal did not meet all of the core technical requirements, the proposal was eliminated.

The “schedule” category for this particular procurement was firm, so included not only the vendor’s promise to meet the schedule, but also the vendor’s willingness to back up that promise by agreeing to a liquidated damages clause in the contract. The “schedule” category also evaluated what reference customers had to say about the offeror’s ability to meet previous schedules.[Ref.20]

The service company added that the definition of *best value* to them is really their interpretation of what constitutes *best value* to the ultimate client. It was considered to be a driver for their evaluations, whether another commercial concern or the Government. The service company attempted to provide the *best value* to the customer by identifying what the particular client views as the most important factors, and then adjusting their proposal, to ensure that their proposal and performance provides the *best value*. The service company had recently been involved in a Government *best value* acquisition and

found that they were able to discover much about what the Government considered *best value* through the negotiation process. This insight allowed them to adjust certain elements in the proposal to win the award.[Ref. 21] The service company indicated that cost is always a factor, but its relative importance changes based the level of importance placed on it by the end user. Other evaluation factors also varied based on the end users perspective; hence flexibility is the key to this company whether dealing with Government or a commercial concern.

C. BEST VALUE IMPLEMENTATION, A COMMERCIAL PERSPECTIVE

The technology and service companies each had a perspective on the implementation of best value in their non-governmental dealings as well as in their dealings with the Government.

1. Use of *Best Value* in non-Government contracts

The technology company expressed the opinion that their use of *best value* in their non-governmental actions had been “a mixed bag”. When the company had taken the time and effort to plan, the results had been extremely good, however, when the company had not done effective planning or was under a time constraint the results have not always been satisfactory. Much like the Government experiences that were detailed in Chapter IV, the failure to plan and research the market prior to solicitation, led to difficulties throughout performance. One area that has greatly increased the technology company’s ability to make *best value* tradeoff decision has been the submission of the proposal via electronic format. This has allowed for the evaluators to manipulate the data during the source selection process and arrive at the *best value* decision based on variable scenarios and multiple requirement factors. [Ref. 20]

The service company had a long history of *best value* dealings as a provider of services to other commercial concerns, as well as with their own purchases from suppliers. The service company thought, as did the technology company, that the *best value* concept starts with the relationship between the companies and not the immediate requirement, although that is where many relationships start. The service company stated they are viewing a potential supplier in terms of a desired end state and not all of their business relationships “start out great right out of the gate,” but if they determine that the supplier will make an effort, they will keep working with the supplier to both of their long term advantage. If the supplier does not “fit,” nor is he/she deemed likely to in the future, the service company terminates the relationship and moves on to another supplier. Thus, the service company maintains business relationships with suppliers who have historically provided them *best value*.[Ref. 21]

2. Use of *Best Value* in Government contracts

When asked what the Government had done well, and what the Government had done poorly; the technology company expressed concern that the Government’s effort to try to pursue development using a fixed price contract would not likely provide the Government with a desired outcome. The A-12 experience of the Navy would tend to bear this out and the results of a developmental Price Based Acquisition (PBA) will have to be reviewed to see if it holds promise for the future. The technology company thought that the FAR and other policies that the Government provided a good structure and framework from which to operate. The technology company thought that having a Contracting Officer and a COTR provided a good mix of expertise. However, the COTR’s authority needed to be limited and in writing. The technology company was

concerned that *best value* is not implemented in a standardized fashion across the different agencies of the Government.[Ref. 20]

The service company was fairly new to dealing with the Government, but had some critical insight for Government Contracting Officers, as of last year; the Government spent more on services than for parts and equipment. The service company thought that the Government managed the internal processes well and was aggressive in taking on the very complex issues in the acquisition. The service company also thought that it had learned a lot during the acquisition that will assist them in providing *best value* in the performance of the contract, as well as with other Government contracts they may pursue in the future. The service company expressed a concern that the Government had not truly defined the actual costs they were expending for the service they were receiving previously nor was the Government all that familiar with the market's capabilities and constraints.[Ref. 21]

The service company also thought a Statement of Objective was preferable to a Statement of Work, because as a leader in the industry, having set the performance standards for the industry, the standards of the service company were more strict than those of the Government. Also, the Government defining the end state without telling the contractor how to do each task allowed the service company to use its innovative approaches to provide superior service. The service company also expressed a unique insight that many who deal with the Government on a regular basis will find most telling about the environment in which they operate; and that is for their recent first experience in Government procurement they thought that they should have brought more lawyers in earlier.

C. AREAS OF *BEST VALUE* THAT MAY NEED ATTENTION: AN INDUSTRY VIEWPOINT

The service company and technology company detailed some areas of *best value* they thought Government needed to address to possibly correct actions and perceptions. These companies also highlighted some of the areas that they were working on to improve their own use of *best value* either as on offeror to the Government or as end user from their suppliers.

Contracting Officer Training: The service company and technology company expressed a concern the practice of *best value*, not consistently practiced, may become more disjointed with what they viewed as the impending retirement of so many of the people in the Government's acquisition workforce. The service company said that the various trade associations of which it is a member have discussed the issue as both a concern and an opportunity. An opportunity because new Contracting Officers would not be tied to the old ways of doing business (i.e., certified cost or pricing data) nor would they be encumbered with many of the perceived biases that many felt were present in the current workforce. The service company expressed the opinion that the Government had the opportunity to train the next generation of Contracting Officers in best value and inject the lessons already learned into that training program to avoid repeating the problems in the future.

The service company and technology company emphasized their view of the need to provide training to the Government's contracting workforce because of a gap in expertise and the need for the Government to present one face to industry. Specifically, the companies thought the Government needed to place a greater emphasis on the desired end state and not how to get there, as this involves a greater reliance on Statement of

Objectives. The service company and its trade association agreed that the Performance Based Service Acquisition initiative is critical to the industry and the Government, because the Government will get better service at less cost and industry would be able to incorporate innovation as long as the desired end state was achieved.

The technology company, which has more experience with Government acquisition, said the type of training that Contracting Officers received at NPS and DAU that stressed a win-win attitude vice the adversarial relationship of old is a welcome change.[Ref. 20]

COFD Objectivity: Another area that some industry managers think the Government needs to work on is the perception that the Contracting Officer's Final Decision was not really an objective review by the Government Contracting Officer acting in his/her capacity as a neutral adjudicating authority. Rather, the technology company expressed a concern that the COFD is perceived as a review by the Contracting Officer of a decision in which they had a vested interest and were highly unlikely to change. Even the Contracting Officer's who were able to be objective in this process needed to be able to communicate the reasoning behind their decisions.

As detailed in Chapter III, preparation for this thesis involved a review of all GAO bid protests from January 01, 2000 to April 30, 2001; of the 136 *best value* cases reviewed by GAO, 106 or 78% were cited for improper evaluation. Of these 106 cases, GAO found in favor of the protestor 22 times or 21% of the time. This indicated that not only did industry doubt the Government's evaluation objectivity, but in 21% of the cases industry was correct in their assertion. This credibility gap was perhaps the Government's greatest problem for it indicated an erosion of the public trust.

Past Performance: An issue brought forth by the service company was that of the Government's use of past performance. The Government had made a significant effort to expand the use of past performance as an evaluation factor at the same time that commercial industry was less willing to provide this type of data. The litigious nature of today's society may mean fewer companies were willing to provide meaningful evaluations for their suppliers because of the fear of a lawsuit. The question of access to past performance data would have to be resolved if the Government was going to increase the importance of past performance in the evaluations of *best value*, otherwise the only past performance data the Government would be likely to receive would be from other Government entities.[Ref. 21]

Commercial Sector Improvements: The technology company was improving their method of bidding by trying to conduct more critical self-assessments prior to proposal submission. This would not only identify areas they could improve, but where they had room to maneuver in negotiations. Another aspect of a self-review this company mentioned was that it would also define what it would not do to win a contract. That was sacrifice quality or do anything that would damage the ethical standing of the company.[Ref. 20]

D. DIFFERENCES BETWEEN COMMERCIAL AND GOVERNMENT USE OF *BEST VALUE*

It would be difficult for the Government to emulate these commercial practices relative to best value, because of the litigation that Government procurement draws.

Also, because of the socioeconomic goals that are not designed for efficiency but rather to ensure various constituencies are able to participate in the procurement process.

A private company is able to “fire” a non-performing supplier by not using them in the future, and there is no method for an unsuccessful offeror to refute the company’s decision to not select them. The Government’s process has many built in safeguards to ensure that all members of the society are treated fairly and reasonably. However, the Stratos case demonstrated even when the Government acts in a fair and reasonable manner, there may be an aggrieved party, who feels their best chance lies in a lawsuit and will take the Government to court in order to win a contract it failed to win at the bargaining table. This is a significant difference in that the aggrieved party in commercial practice has no recourse, unless the company was clearly discriminatory. Whereas, in Government procurement there are numerous avenues to challenge the Government’s choices, and under the Equal Access to Justice Act, the Government may even have to pay for the contractor’s legal fees in challenging a Government decision.

There are rules that the Government must adhere to that force the Government to do business with a company with a questionable performance history, or which does not have the capability to guarantee a positive outcome. The nature of Congressionally mandated socio-economic goals is the very antithesis of the Government’s attempt to attain best value, in that it interferes with a purely competitive process and puts a weight on factors that will provide not immediate benefit to the specific program but will benefit society as a whole and future programs through increased participation and strength of the industrial base.

E. SIMILARITIES BETWEEN COMMERCIAL AND GOVERNMENT USE OF *BEST VALUE*

The service company and technology company expressed the views that the most important aspect of a successful *best value* procurement was a complete effort in the acquisition planning phase. As highlighted in the cases from Chapter IV, this involves defining the trade-off factors and the relative importance of each to the end user; knowing the capabilities and limitations of the marketplace; effectively communicating the requirement and evaluation factors to the marketplace; and evaluating the proposals based on the solicitation. It appears that the goals for *best value* in Government and commercial use are exactly the same in attempting to reach that trade-off point along the *best value* continuum that most closely fulfills the needs of the party involved.

F. CHAPTER SUMMARY

This chapter detailed the results of the interviews of two commercial businesses that have practiced *best value* in their non-governmental activities, as well as having been involved in Government *best value* procurement. These interviews highlighted some of the perceived differences and similarities in the way *best value* has been implemented in the two sectors. The interviews also highlighted the perspective of where industry thinks the Government needs to apply some effort to improve its use of *best value*. The chapter also detailed the two primary constraints making Government procurement different than commercial procurement, socio-economic goals and litigation. Any change the Government makes must be made within the context of these constraints.

Chapter VI will draw together the lessons learned from Chapters IV and V, provide recommendations to mitigate problems, answer the research questions, and provide recommended areas for future research.

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VI. FINAL CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

The purpose of this chapter is to detail some of the problems that the Government experienced implementing *best value*, including lessons learned from the cases analyzed in Chapter IV, such as: acquisition planning issues; solicitation issues, evaluation issues, and the industry perception of the Government's use of *best value*. This chapter will also answer the research questions regarding the Government's implementation of *best value* and offer recommendations to improve the use of *best value*. Finally, this chapter will provide recommended areas for future study regarding *best value*.

B. ACQUISITION PLANNING ISSUES

As detailed in Chapter II, acquisition begins with the receipt of the requirement from the user.

Acquisition planning means the process by which the efforts of all personnel responsible for the acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition. The method of contracting and type of contract must be determined. A source selection plan and statement of work/objective are formulated.[Ref. 22]

The acquisition planning phase also involves the release of a draft RFP and pre-solicitation conferences, if desired and the verification of funding.

All of the cases presented in Chapter IV revealed areas the Government could have improved its acquisition planning phase, even the cases when the ruling favored the Government showed areas that could use improvement.

Understanding the Requirement: *Meridian* demonstrated that a protest could be sustained if the Government does not readily understand the nature of the requirement or if it is unable to express the requirement. In *Meridian*, the Contracting Officer failed to understand the unique nature of the requirement in the laboratories represented an additional risk to potential offeror's and for the contractors to be able to identify the complete scope of the requirement the potential offerors needed to be provided access to the spaces to be able to assess the requirement for themselves; or the Contracting Officer needed to provide detailed data on that portion of the requirement that the potential offerors were unable to assess. The Contracting Officer set the procurement up for a sustainable protest and increased the risk to both parties, because the offeror's could have been bidding on a service that they did not have a complete picture of and for which the awardee would be accountable.

Understanding the Marketplace: *Ryder* demonstrated that not taking into account the marketplace from which the Government is trying to attain *best value* could lead to a suit that will cost the Government time and money defending the actions of the Contracting Officer. It is the researcher's contention that the Contracting Officer may have been able to insulate the Government from this suit had she thoroughly researched the relocation marketplace, seen that several potential offeror's did not have independent financial data, and realized that this may present a problem in the evaluation. The pre-solicitation conference would have been a good time to inform all potential offeror's of how D&B was going to do the evaluations, particularly since D&B was doing similar evaluations for other agencies so the process was not, nor should it have been a secret. The Contracting Officer should have foreseen that this was where the difficulties would

arise, since the solicitation stated that performance risk was the most important evaluation factor. In this case, the Contracting Officer would not have had to change the source selection plan or how D&B performed the financial risk assessment. Rather, by identifying the problem during the acquisition planning phase she could have diffused it at the pre-solicitation conference. Additionally, the input at the pre-solicitation conference may have caused the Government to rethink its position and change the evaluation plan. However, failing to identify the potential issue in the acquisition planning phase meant the Government was not able to address it until the matter was before the court, costing the program time and money. In the *DSC* case, the Government failed to understand the marketplace to such an extent that the Contracting Officer certified DSC's proposal to provide a fair and reasonable price, despite the fact that it was \$31M below the competitor's proposal and \$30M below DSC's cost to perform.

Dispute Prevention: *Stratos* demonstrated that even when the Government follows all of the regulations and statutes, a disgruntled contractor could still impact the program through lawsuits. This case was particularly alarming, because the trial court sided with the plaintiff even though the solicitation pointed out that the evaluation would take into account several likely outcomes and not only the anticipated usage. The fact that the Government prevailed in the appellate court spoke to the thoroughness of the plan and the Navy's execution of its plan. The lesson taken away from *Stratos* was to develop a plan that would ensure the Government got *best value*, and to review the plan with legal council to add in language that would insulate the Government from an adverse decision. In Chapter IV, such a language was detailed at the conclusion to this case, but there are many variations that would accomplish the same goal.

Trade-off Decision: *DSC* represented a poor effort during the acquisition planning phase, because the Government set itself up to fail once it decided to select *best value* based on the lowest price technically acceptable side of the *best value* continuum. That trade-off decision was more suitable to a commodity than to this highly complex systems contract because it meant that if the proposal were deemed acceptable, price would be the sole determining factor in the source selection. The complexity of the program and limited oversight by the Government should have indicated some performance or technical approach measures should have been considered in the evaluation plan. The Contracting Officer for the Government seemed to have learned from the *DSC* case, because the follow-on contract for the HYDRA-70 rocket involved a trade-off of technical approach, management expertise and past performance.

Adherence to Regulations: *DSC* and *Meridian* also demonstrated the impact of the Government's failure to read and use its own regulations. The failure of IOC to separate the FMS and SDAF quantities as required had a direct impact on *DSC*'s bid strategy and ultimately played a part in *DSC*'s failures in the performance of the contract and as a going concern. In the *Meridian* case, the failure to consider price, as required by the FAR, led to a sustained protest and cost the Government the time and resources to re-compete the contract. Additionally, the Government was forced to pay for *Meridian*'s legal fees in the protest.

Each of the four cases detailed in this thesis revolve around a different set of facts and were heard before a different adjudicating authority, the one thing the cases share is that the acquisition planning phase was the starting point for their ultimate success or

failure. It appears that the time spent in acquisition planning more than pays off in the follow-on phases of the contract and acquisition processes.

C. SOLICITATION ISSUES

The communication of the requirement, or solicitation, must be detailed enough to give the potential offeror a chance to gauge the true scope of the effort they are going to submit a proposal on, as well as provide a relative hierarchy of the evaluation factors and how the Government views the importance of the tradeoff factors involved on this particular requirement.

Meridian was an example of the solicitation changing the relative weights of factors as the proposals were being evaluated as being closer to each other, unfortunately for the Government; they left out a mandatory factor-price. *Stratos* and *Ryder* each had a solicitation that adequately portrayed the requirement and provided the contractors with an idea of the relative importance of each of the evaluation factors.

DSC represented a solicitation that did not accurately portray the scope of the requirement nor did it accurately reflect the quantities involved. This incomplete solicitation was a contributing factor in the ultimate downfall of DSC.

D. EVALUATION ISSUES

The evaluation of the proposals must follow the RFP or a sustainable protest can result. The *Meridian* case highlighted the problem when GAO found that GSA had failed to include Meridian in the competitive range, because they had not followed their own

solicitation. The RFP had stated that as the past performance and experience evaluation factors became closer, price would take on increased importance.

The Government failed to evaluate the awardee correctly in the *DSC* case; through its failure to identify the DSC proposal as “buy in” and that this proposal did not represent a fair and reasonable price. This failure to correctly evaluate the proposal led to problems throughout the performance of the contract, and ultimately to the demise of DSC as a business.

E. INDUSTRY PERCEPTION OF THE GOVERNMENT ISSUES

The interviews detailed in Chapter V revealed perceptions held by some companies that the Government has some areas to work on regarding best value implementation and that there are areas that the Government has proven to be effective.

Perception of non-objective COFDs: The technology company related the perception that the COFD process was viewed as less than objective, because of the doubt that a Contracting Officer would be truly objective in evaluating the reasoning used for their own decision. This perception appears to be supported by the finding detailed in Chapter III. The review of the 136 GAO protests for this thesis revealed 106 were protests for an improper evaluation. Of these, 21% were decided in favor of the protestor. The Government cannot afford to do its job correctly only 79% of the time and maintain the public’s confidence.

Perception of Marketplace Knowledge: The service company interviewed for Chapter V relayed the opinion that the Government was not as familiar with the marketplace as had been expected. This required significant adjustment on their proposal

as negotiations moved forward and they gained a greater understanding of what the Government was looking for in terms of *best value*. One truth in the commercial and Government arenas was that the best customer is an informed customer, in *best value* this means the Contracting Officer must have a firm grasp of what he/she is looking for in terms of *best value* and be aware of what the marketplace is capable of offering.

Perception of Training: The technology company interviewed in Chapter V related the perception that the current emphasis on a “win-win” relationship at NPS and DAU is significantly better than the adversarial relationship of the past. The technology company also related that the FAR provided a good contracting framework for Government Contracting Officers. The service company expressed the opinion that Contracting Officers were well trained in identifying factors affecting the procurement.

F. RESEARCH QUESTIONS

1. Primary Research Question

To what extent have recent rulings and decisions by the Federal Courts, Armed Services Board of Contract Appeals, and General Accounting Office highlighted recurring problems with best value selections and is there a means to eliminate the problems?

The conclusions drawn from this research effort are somewhat similar to those drawn by John T. Palmer in his 1997 review of GAO protests involving *best value*. The scope of this thesis is different in that it dealt with cases tried before each of the adjudicating authorities involved in Government procurement, but the fact remains that acquisition planning failures and the appalling failure to review the applicable rules and

laws have not been corrected. Additionally, a standardized framework or template has not yet been developed for Contracting Officers to use as a guide. This guide could be critical from two standpoints: first, it would give Contracting Officers a well thought out framework to begin with; secondly, it could be modified and standardized to reflect the most recent court decisions that would have a bearing on the Government's *best value* implementation. It appears no additional regulation is required to improve the Government's use of *best value*. Each of the cases in Chapter IV revealed adequate laws were already in place, the problems in these cases arose from the Contracting Officer ignoring or misapplying existing laws and regulations.

2. Secondary Research Questions

There are five secondary research questions:

1. *What is the background and history of best value in Government Procurement?*

As stated in Chapter II, there is no one definition of *best value* but rather it is the concept of moving along a continuum, conducting tradeoffs that will result in the greatest overall benefit to the end user.

In sum, *best value* is the expected outcome of any acquisition that ensures the customer's needs are met in the most effective, economical, and timely manner. It is the result of the combination of: the unique circumstances of each acquisition; the acquisition strategy; choice of contracting method; and the award decision. *Best value* is the goal of sealed bidding, simplified acquisition, commercial items acquisition, negotiated acquisition, and any other specialized acquisition method or combination of methods. Through the *best value* continuum, the Government always seeks to obtain the best value in negotiated acquisitions using any one or a combination of source selection approaches, and that acquisition should be tailored to the requirement. At one end of this continuum is the lowest priced technically acceptable strategy and at the other end is a process by which elements of a proposed solution can be traded off against each other to determine the solution that provides the Government with the overall best value. All such tradeoffs must be conducted according to the source

selection factors and subfactors identified in the solicitation.[Ref. 22]

2. *What will analysis of Federal Court, Armed Services Board of Contract Appeals, and General Accounting Office decisions reveal about the Government's implementation of best value?*

The analysis of decisions or recommendations before the various adjudicating authorities revealed that the Government must develop a method to ensure that thorough acquisition planning takes place for every *best value* procurement, particularly those that involve the use of judgment in the evaluation and selection phases. The Government makes a reasoned decision based on the factors that are critical to the end user and must be able to document the reasons for the final decision. It is in the acquisition planning phase where all of these factors are first considered and start to take form, so it is in this phase that a successful procurement is born or that is the genesis of the problems experienced all the way through performance.

3. *What are the lessons learned regarding best value?*

The primary lesson is that all parties must coordinate their efforts to ensure a complete and thorough acquisition plan is conducted. The acquisition planning phase becomes even more critical as the procurement gets more complex or where there are multiple tradeoff factors involved.

The secondary lesson applies to all Government procurement, the Contracting Officer must understand and apply the rules that bind the Government. Failure to apply the rules not only leads to sustainable protests but also to a loss of public trust.

4. *How does the commercial sector utilize best value in conducting business?*

The commercial sector was similar to the Government in its use of *best value*; however, there were several key differences. A commercial concern did not need to be as concerned with protests or disputes of its actions. As a matter of fact, as long as they did not openly discriminate the court system would not intervene in the conduct of normal business.

The commercial sector was also interested in economy, quality, and even to some extent, socio-economic goals. However the bottom line was that they are able to be much more flexible in their decision making process because of the lack of review by the judicial branch.

Additionally, the companies interviewed also had a standardized framework within which to operate. They also ensured complete understanding of what represented *best value* to them or their end user before setting off to fill the requirement.

5. *What mechanism can be put in place for the promulgation, dissemination, and incorporation of the lessons into the conduct of the Government's procurement professionals?*

The literature review revealed that there was no single source of information regarding *best value* lessons learned. There were a few thesis', this one included, that look at certain aspects of *best value*, but there was no periodic review of the lessons that each of the cases before an adjudicating authority presented. An acquisition student at the Naval Postgraduate School or Defense Acquisition University writing an article or series of articles for Contract Management or Army Lawyer magazines in lieu of a thesis requirement would be an effective way of promulgating these lessons to Government procurement professionals.

G. RECOMMENDATIONS

This research suggests the following recommendations to improve the Government's implementation of best value and to avoid litigation:

- Place emphasis on the acquisition planning phase to ensure that all factors relevant to the requirement and marketplace are considered in the formulation of the procurement strategy.
- Forward draft solicitations to industry and hold presolicitation conferences, if possible, to ensure a complete understanding of the marketplace by the Government and to allow for changes in the solicitation as early in the acquisition process as possible.
- Forward the draft solicitation to legal council for review to ensure all applicable regulations have been followed and to insert language that may minimize the likelihood of a successful challenge.
- Future postgraduate students should be given the option of writing a series of articles for a periodical in lieu of a thesis. These articles should detail recent findings regarding the Government's implementation of *best value*.
- Maintain thorough contract files so that the record can "stand on its own" in a court proceeding.
- Contracting Officers should thoroughly debrief a contractor on the judgment and reasoning used on a COFD to negate industry's perception that it is not objective.

H. AREAS FOR FURTHER RESEARCH

This thesis illuminated several deficiencies in the Government's implementation of *best value*. However, since the research was limited in scope and methodology,

numerous areas of the Government's implementation of *best value* remain for future research, including:

- **Conduct a review of best value decisions and recommendations from GAO, ASBCA, and the Federal courts on a biannual basis.**

The effort could determine if the problems highlighted in this thesis have been eliminated or minimized.

- **Develop an evaluation template for the acquisition planning phase.**

This template would assist Contracting Officers in developing the sources selection plan with the end user during the acquisition planning phase. This template should be in an electronic format to ease its manipulation for the specifics of each procurement and in order for changes in the Government procurement system to be easily incorporated.

- **Review cases from the U.S. Court of Appeals for the Federal Circuit in which the appellate court overturned the decision of the U.S. Court of Federal Claims.**

Use the reviewed cases to detail the differences in the application of regulations for the same set of facts by these two courts.

- **Monitor the Government's use of *best value* as the current workforce starts to retire to see if the problems highlighted in this effort increase or decrease as the more experienced Contracting Officers retire.**

This study would be useful in determining if the educational system for Contracting Officers will need to be modified.

- **Write a series of articles for Contract Management magazine and Army Lawyer detailing recent *best value* findings by the various adjudicating authorities.**

This action would constitute an indirect continuing education for both Contracting Officers and for others involved in the acquisition process. It would keep the above persons current in their field.

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